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In the

United States Court of Appeals

For the Seventh Circuit

No. 11996

HENDERSON MILOM, *Plaintiff-Appellee,* *vs.* **NEW YORK CENTRAL RAILROAD COMPANY, a Corporation,** *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. Honorable **Philip L. Sullivan,** Trial Judge.

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLANT.

STATEMENT OF THE FACTS.

(A) Nature of the Case

This action, arising under the Federal Employers' Liability Act, Title 45, U. S. C. § 51, *et seq.*, was brought by the plaintiff, a dining car waiter in the employ of the defendant, to recover for alleged injuries sustained during the course of his employment. The jury returned a verdict for $7,500 in the plaintiff's favor upon which the court entered judgment on December 7, 1956. It is from this judgment that this appeal is taken. The errors relied

on arise out of the action of the trial court in overruling defendant's motions for a directed verdict, for judgment notwithstanding the verdict and for a new trial. Appellant does not predicate error upon the amount of the judgment.

(B) Statement of the Facts.

On November 16, 1954, at the defendant's Mott Haven yards, in the City of New York, New York, the plaintiff, Henderson Milom, reported for work as a dining car pantry man on one of defendant's dining cars. The plaintiff commenced work at 3:00 P. M. in order to prepare for the evening meal to be served on his train which was scheduled to depart from New York at 6:10 P. M. The duties of a pantry man were to order supplies, receive the supplies, ice up vegetables, fruits, fruit juices and butter. One of plaintiff's duties on this occasion was to bring a cake of ice into the pantry from the back platform of the dining car. The plaintiff dragged a 50 lb. cake of ice from the platform into the pantry with one of the sets of ice tongs provided by the defendant. After dragging the ice into the pantry he picked it up with the ice tongs. When he had lifted the ice about three feet the block of ice slipped in the tongs. The plaintiff held on to the ice tongs with his left hand and the tongs regripped in the ice before it hit the floor, thereby jerking or snapping his wrist. After this occurrence the plaintiff succeeded in lifting the ice.

From the date of the accident until April 4, 1955, some four and one-half months, the plaintiff continued to work for the defendant in his usual occupation. On April 4, 1955, the plaintiff's hand was operated upon by one of defendant's surgeons for a multi-ganglia involving the third tendon of the left hand. The plaintiff remained in the hospital for three days until April 7, 1955. As a result of the operation plaintiff did not work from April 5, 1955, to August 1, 1955.

The plaintiff had handled ice for the defendant for a period of thirteen years prior to the accident. He had looked at the ice tongs prior to the accident but did not inspect them. He did not make a complaint to anyone associated with the defendant either on the day of the accident or before concerning any condition of the ice tongs. At no time did he make a complaint to the defendant concerning the condition of the ice tongs. Neither plaintiff nor any other witness testified that the ice tongs were dull, or otherwise defective.

Plaintiff's Exhibit 1, received in evidence, was a set of ice tongs which was representative of the type of tongs used by the plaintiff at the time of the accident. It was agreed that plaintiff's Exhibit 1 was not the set used by the plaintiff on the occurrence in question.

SUMMARY OF ARGUMENT.

I.

The Motions of the Defendant for a Directed Verdict and Judgment Notwithstanding the Verdict Should Have Been Sustained Because There Was No Evidence to Support a Finding That the Ice Tongs Were Dull, or Otherwise Defective.

(1) Where the plaintiff fails to prove an element of a prima facie case it is the duty of the trial court to direct a verdict in the defendant's favor;

(2) There is no evidence in the record to support any one or more of the charges of negligence which were submitted to the jury;

(3) Plaintiff must prove one or more of his charges by competent evidence in order to present a submissible case to the jury;

(4) The verdict returned by the jury was based solely on conjecture;

(5) The mere fact that an accident takes place, or an injury is sustained, does not give rise to a presumption of negligence, under the Federal Employers' Liability Act, nor permit the jury to speculate that the accident would not have happened in the absence of negligence;

(6) Plaintiff's own voluntary acts constituted the sole proximate cause of his injury;

(7) Recent decisions of the United States Supreme Court do not prevent courts of review from determining whether there is any evidence to support a jury verdict.

THE CONTESTED ISSUES.

I.

Does the record contain any evidence which fairly and reasonably tends to support any one of the charges of negligence submitted to the jury?

II.

Was the defendant entitled to a directed verdict in its favor?

III.

Did the trial court commit error in denying defendant's motion for a judgment notwithstanding the verdict?

IV.

Did the plaintiff's own voluntary acts constitute the sole proximate cause of his injuries?

PROPOSITIONS OF LAW AND SUPPORTING AUTHORITIES.

I.

THE MOTIONS OF THE DEFENDANT FOR A DIRECTED VERDICT AS WELL AS ITS MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, SHOULD HAVE BEEN SUSTAINED BECAUSE THERE WAS NO EVIDENCE TO SUPPORT A FINDING THAT THE ICE TONGS WERE DULL, OR OTHERWISE DEFECTIVE.

A. Where the Plaintiff Fails to Prove an Element of a Prima Facie Case It Is the Duty of the Trial Court to Direct a Verdict in the Defendant's Favor.

Brady v. Southern Railway Company, 320 U. S. 476, 64 S. Ct. 232 (1943).

Patton v. Texas & Pacific Railway Company, 179 U. S. 658, 21 S. Ct. 275 (1901).

Moore v. Chesapeake & Ohio Railway Company, 340 U. S. 573, 71 S. Ct. 428 (1951).

Eckenrode v. *Pennsylvania Railroad Company*, 164 F. 2d 996 (3rd, 1947), affirmed 335 U. S. 329, 69 S. Ct. 91 (1948).

Tennant v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29, 64 S. Ct. 409 (1944).

B. There Is No Evidence in the Record to Support the Charges of Negligence Which Were Submitted to the Jury.

Atchison, Topeka & Santa Fe Railway Company v. Toops, 281 U. S. 351, 50 S. Ct. 281 (1930).

Galloway v. United States, 319 U. S. 372, 63 S. Ct. 1077 (1943).

Trust Company of Chicago v. Erie Railroad Company, 165 F. 2d 806 (7th, 1948).

Eckenrode v. Pennsylvania Railroad Company, 164 F. 2d 996 (3rd, 1947), affirmed 335 U. S. 329, 69 S. Ct. 91 (1948).

C. Plaintiff Must Prove One or More of His Charges of Negligence by Competent Evidence in Order to Present a Submissible Case.

Chesapeake & Ohio Railway Company v. Thomas, 198 F. 2d 783 (4th, 1952).

Atlantic Coast Line Railroad Company v. Collins, 235 F. 2d 805 (4th, 1956).

Payne v. Baltimore & Ohio Railroad Company, 351 Ill. App. 186, 114 N. E. 2d 323 (1953).

Condon v. Schoenfeld, 214 Ill. 226, 73 N. E. 333 (1905).

Brady v. Southern Railway Company, 320 U. S. 476, 64 S. Ct. 232 (1943).

Pennsylvania Railroad Company v. Chamberlain, 288 U. S. 333, 53 S. Ct. 391 (1933).

Wadiak v. Illinois Central Railroad Company, 208 F. 2d 975 (7th, 1953).

Wetherbee v. Elgin, Joliet & Eastern Railroad Company, 204 F. 2d 755 (7th, 1953).

Kaminski v. Chicago River & Indiana Railroad Company, 200 F. 2d 1 (7th, 1952).

D. The Verdict Returned by the Jury Was Based Solely on Conjecture.

Trust Company of Chicago v. Erie Railroad Company, 165 F. 2d 806 (7th, 1948).

Pennsylvania Railroad Company v. Chamberlain, 288 U. S. 333, 53 S. Ct. 391 (1933).

Huff v. Illinois Central Railroad Company, 362 Ill. 95, 119 N. E. 116 (1935).

Smith v. *First National Bank of Westfield*, 99 Mass. 605 (1868).

E. The Mere Fact That an Accident Takes Place, or an Injury Is Sustained, Does Not Give Rise to a Presumption of Negligence Under the Federal Employers' Liability Act, Nor Permit the Jury to Speculate That the Accident Would Not Have Happened in the Absence of Negligence.

Barnett v. Terminal Railroad Association of St. Louis, 228 F. 2d 756 (8th, 1956).

Trust Company of Chicago v. Erie Railroad Company, 165 F. 2d 806 (7th, 1948).

Atchison, Topeka & Santa Fe Railway Company v. Toops, 281 U. S. 351, 50 S. Ct. 281 (1930).

Tiller v. *Atlantic Coast Line Railroad Company*, 318 U. S. 54, 63 S. Ct. 444 (1942).

Wilkerson v. *McCarthy*, 336 U. S. 53, 69 S. Ct. 416 (1949).

Pennsylvania Railroad Company v. *Chamberlain*, 288 U. S. 333, 53 S. Ct. 391 (1933).

Wolfe v. *Henwood*, 162 F. 2d 998 (8th, 1947).

Kautz v. *Delaware, Lackawanna & Western Railroad Company*, 129 F. Supp. 777 (U. S. D. C. Pa., 1955).

Myers v. *Reading Company*, 331 U. S. 477, 67 S. Ct. 1334 (1947).

Boston & Maine Railroad Company v. *Coppellotti*, 167 F. 2d 201 (1st, 1948).

Van Ripper v. *The New York Central Railroad Company*, 227 F. 2d 823 (6th, 1955).

Moore v. *Chesapeake & Ohio Railway Company*, 340 U. S. 573, 71 S. Ct. 428 (1951).

McCracken v. Richmond, Fredericksburg & Potomac R. Co., 240 F. 2d 484 (4th, 1957).

F. The Plaintiff's Own Voluntary Acts Constituted the Sole Proximate Cause of His Injuries.

Atlantic Coast Line Railroad Company v. Dixon, 189 F. 2d 525 (5th, 1951).

G. Recent Decisions of the United States Supreme Court Do Not Prevent Courts of Review from Determining Whether There Is Any Evidence to Support a Jury Verdict.

Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740 (1945).

Webb v. Illinois Central Railroad Company, 352 U. S. 503, 77 S. Ct. ..... (1957).

Rogers v. Missouri Pacific Railroad Company, 352 U. S. 493, 77 S. Ct. ..... (1957).

ARGUMENT.

I.

THE MOTIONS OF THE DEFENDANT FOR A DIRECTED VERDICT, AT THE CLOSE OF THE EVIDENCE SUBMITTED ON BEHALF OF THE PLAINTIFF, AND AGAIN AT THE CLOSE OF ALL THE EVIDENCE SUBMITTED BY BOTH PARTIES, AS WELL AS ITS MOTION FOR A JUDGMENT NOTWITHSTANDING THE VERDICT SHOULD HAVE BEEN SUSTAINED BECAUSE THERE WAS NO EVIDENCE TO SUPPORT A FINDING THAT THE ICE TONGS WERE DULL, OR OTHERWISE DEFECTIVE.

1. Where the Plaintiff Fails to Prove an Element of a Prima Facie Case It Is the Duty of the Trial Court to Direct a Verdict in the Defendant's Favor.

The Federal Employers' Liability Act, Title 45 U.S.C., 51, provides in substance, that an employee who sustains an injury at work is entitled to a money recovery where such injury results, in whole or in part, from the negligence of the officers, agents or employees of a railroad employer.

In the case at bar, an indispensable element of plaintiff's action was proof by him that the injuries of which he complained proximately resulted from negligence of the defendant in one or more of the respects charged in his complaint. Plaintiff's complaint alleges in substance that defendant supplied him with defective ice tongs. This is the sole theory of plaintiff's case, although it is expressed in various ways in the separate charges of negligence in the complaint. It was incumbent upon plaintiff to prove negligence on the part of defendant and that such negligence was the proximate cause of the injury. *Tennant* v. *Peoria*

& P. C. Ry. Co., 321 U. S. 29, 32, 64 S. Ct. 409 (1944). It is fundamental that where the plaintiff fails to establish by a preponderance of the evidence any one or more of the charges of negligence, the trial court should direct a verdict for the defendant or grant its motion for judgment. *Moore* v. *Chesapeake & Ohio Railway Company*, 340 U. S. 573, 71 S. Ct. 428 (1951), *Eckenrode* v. *Pennsylvania Railroad Company*, 164 F. 2d 996 (3rd, 1947), affirmed in 335 U. S. 329, 69 S. Ct. 91 (1948).

The duty of the trial court in such an instance has been crystallized by the Supreme Court of the United States in the case of *Brady* v. *Southern Railway Company*, 320 U. S. 476, 64 S. Ct. 232 (1943), at pages 479-480:

> "* * * When the evidence is such that without weighing the credibility of the witness there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims * * *"

In the case of *Patton* v. *Texas & Pacific Railway Company*, 179 U. S. 658, 21 S. Ct. 275 (1901), the United States Supreme Court had occasion to discuss the burden of proof in a negligence case. The Court in enunciating the duty of the employee stated, at page 664:

> "If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs * * *"

2. There Is No Evidence in the Record to Support the Charges of Negligence Which Were Submitted to the Jury.

At the close of the plaintiff's case, and again at the end of all the evidence, the defendant requested of the court an instruction directing a verdict of "not guilty" as to each of the four charges of negligence. The four charges of negligence were contained in sub-paragraphs (a), (b), (c), and (d) of paragraph 3 of plaintiff's amended complaint.

Sub-paragraph (a) charged the defendant with negligence in that it "maintained and provided the plaintiff with defective ice tongs."

The plaintiff testified that he reported for work at 3:00 P. M. and proceeded to take the necessary steps to get the ice aboard the dining car for use at the evening meal. The ice had been placed on the back platform of the dining car, presumably by another employee of the defendant, though the record is silent on this matter. The plaintiff's duty was to bring the ice into the pantry for use "down the line" as well as to ice vegetables, juices and butter (Appendix, page 20). The block of ice originally weighed approximately 100 lbs. Milom cut the block in half and dragged one 50 lb. piece into the pantry, a distance of 22 feet (Appendix, page 23). While lifting the ice in the pantry the plaintiff testified that he had raised the block of ice approximately three and one-half feet before it slipped in the tongs and that before the ice hit the floor the tongs regripped (Appendix, page 24). From this fact alone it appears that the plaintiff is of the opinion that negligence has been proved on the part of the defendant. It is necessary to set out in detail the testimony of the plaintiff concerning the condition of the tongs alleged to be defective.

From page 35 of the Appendix we have taken the liberty to reproduce the following testimony of the plaintiff on cross-examination:

Q. This block of ice that you hauled in from the platform weighed approximately 50 lbs?
A. About that, sir.
Q. Mr. Milom, did you look at or inspect the tongs prior to using them on the date of the accident?
A. I looked at the tongs, but I didn't inspect them, sir.
Q. Did you inspect them after the accident?
A. No. sir.

From page 36 of the Appendix the following testimony of the plaintiff is reproduced:

Q. Did you make a complaint to anyone associated with the railroad ever, either on the day of the accident or before, concerning a condition of ice tongs?
(Objection to question — overruled — question asked again.)
A. No sir.

This was the only evidence offered during the trial on the condition of the tongs. By no stretch of the imagination may it be said this evidence can support a finding that the tongs were defective. It is significant to note that plaintiff's counsel never asked Milom if the tongs were sharp or dull.

The second charge of negligence was contained in paragraph 3, sub-paragraph (b) which stated that the defendant negligently "maintained and provided plaintiff with a large block of ice weighing about fifty (50) pounds which contained hollow air holes or blisters and constituted a dangerous and hazardous object in connection with plaintiff's employment by said defendant." This charge of negligence was withdrawn by counsel for the plaintiff at the close of all the evidence.

The third charge of negligence was contained in paragraph 3, sub-paragraph (c) of the amended complaint. In this count it was stated that the defendant negligently, "maintained, operated and controlled said railway coach or dining car without proper covering on the floor thereof, so

that in the course of plaintiff's employment plaintiff was required to lift said block of ice to a ledge on the side or wall of said dining car so that the floor would be kept free from ice, water and slush." This charge also was withdrawn at the close of all the evidence offered in the case.

The last charge of negligence was contained in paragraph 3, sub-paragrapl (d) of the amended complaint. It alleged that the defendant "improperly and negligently maintained and controlled said dining car by the presence of said ledge along the wall or side thereof, and required plaintiff in the course of his duties to lift said large block of ice thereon." It is fundamental that the plaintiff must prove the allegation of negligent maintenance. The record is almost silent as to the presence of the ledge and completely devoid of any evidence as to the condition or purpose of the ledge. This allegation of negligence has never been seriously advanced by the plaintiff.

The pronouncements of the federal courts have been that negligence remains the test of liability. In the case at bar the undisputed evidence and the reasonable inferences to be drawn therefrom demonstrate a total failure of proof as to how the accident happened and what the defendant's act or acts of negligence were. Where there is no conflict in the evidence and a total failure of proof, the jury has no probative evidence upon which to base its verdict. *Galloway* v. *United States*, 319 U. S. 372, 63 S. Ct. 1077 (1943); *Trust Company of Chicago* v. *Erie R. Co.*, 165 F. 2d 806, (7th 1948); *Eckenrode* v. *Pennsylvania Railroad Company*, 164 F. 2d 996 (3rd 1947).

In this action plaintiff failed to prove any negligence which proximately caused or contributed to the cause of the injury in question. It was then incumbent upon the trial court to withdraw the charges of negligence from the consideration of the jury.

In *Atchison, Topeka & Santa Fe Railway Company* v. *Toops*, 281 U. S. 351, 50 S. Ct. 281 (1930) at page 354, Justice Stone said:

"'But proof of negligence alone does not entitle the plaintiff to recover under the Federal Employers' Liability Act. The negligence complained of must be the cause of the injury. The jury may not be permitted to speculate as to its cause and the case must be withdrawn from its consideration unless there is evidence from which the inference may reasonably be drawn that the injury suffered was caused by the negligent act of the employer.' * * *"

3. Plaintiff Must Prove One or More of His Charges of Negligence by Competent Evidence in Order to Present a Submissible Case.

The weight of the evidence requisite to submit to the jury of a case arising under the Federal Employers' Liability Act is unquestioned. The Supreme Court of the United States said in the case of *Brady* v. *Southern Railway Company*, 320 U.S. 477, 64 S. Ct. 232 (1943) at page 479:

"* * * The weight of the evidence under the Federal Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion of the trier of fact, in this case, the jury."

The Federal Employers' Liability Act does not make the employer an insurer against personal injuries sustained by railroad employees. The employee must show by proof that negligence existed and that the negligence proved constituted, in whole or in part, the cause of the injuries complained of. The function of the courts of review has not been abolished in cases under this Act where the record contains no probative facts to support the conclusion of the jury; and to permit that body to arrive at a cause based on speculation and conjecture is "to mask a wisp of suspicion with the cloak of hard facts." *Chesapeake & Ohio Railway Company* v. *Thomas*, 198 F. 2d 783 (4th 1952).

Even though two charges of negligence were submitted to the jury the only serious argument advanced by the plaintiff during the course of the trial concerned the charge that defendant was negligent in that it "maintained and provided the plaintiff with defective ice tongs."

The plaintiff had been employed by the defendant for thirteen years prior to the accident in his present capacity. He testified that he had handled ice for the defendant as long as he was with the railroad (Appendix, page 35). The plaintiff looked at the tongs before the accident but did not inspect them. He further testified that he did not inspect the tongs after the accident even though he used them again on the same afternoon and subsequent to the occurrence involved in this litigation. More important, the plaintiff never made a complaint to the defendant or to any of its agents that the tongs were dull. Never, either before the accident, or on the day of the accident, or at any time thereafter, did plaintiff complain that the tongs were dull. Of the utmost significance is the fact that at no time did plaintiff, or anyone else, testify that the tongs were dull, and indeed, he did not even insinuate that this was so. Witness Morrell testified that he was the superior of the plaintiff and that the plaintiff never mentioned the ice tongs at any time (Appendix, page 41). Obviously the reason plaintiff did not testify that the tongs were dull, was that he could not. His observation of the tongs was not sufficient to determine their condition.

The only eye witness to the accident was the plaintiff. He was silent as to the condition of the tongs though he is the person charged with the responsibility of replacing the tool if it becomes defective (Appendix, page 42). He never replaced the tongs, or requested that they be replaced, or complained of them even though he continued to work for the defendant in his usual job for some five months subsequent to the accident (Appendix, page 36).

If the plaintiff is unable to say that the tongs were defective, or unable to make such an insinuation, how then can the jury more than two years later decide that the tongs were defective. Is it the function of the jury to supply the crucial element of a case, negligence, when there is no evidence of negligence submitted to it? The uncontradicted testimony is that the plaintiff used the tongs after the accident without incident (Appendix, page 26). The testimony of the plaintiff taken in the light most favorable to him does not give rise to any inference that the injury was due to a defective condition of the ice tongs supplied by the defendant; if anything it raises an inference that improper use was made of them by the plaintiff. But speculation is not proof. The essential requirement is that mere speculation be not allowed to do duty for probative facts after making due allowance for all reasonably possible inferences. Moreover, there is a complete lack of evidence to show that the tongs, which had been in constant and effective use, had been reported to the defendant as defective prior to the injury. The fact is that the record discloses affirmatively that no such report was made before or after the accident. Actual or constructive notice that an efficient piece of equipment has become defective or dangerous through use must be shown to establish negligence on the part of the employer before the injured employee can recover damages. *Atlantic Coast Line Railroad Company* v. *Collins*, 235 F. 2d 805 (4th 1956).

In the case of *Payne* v. *Baltimore & Ohio Railroad Company*, 351 Ill. App. 186, 114 N. E. 2d 323, the Court of Illinois had occasion to deal with a case containing no evidence of negligence. The court said at page 191:

> "• • • in the absence of violation of the statute, negligence of the defendant is essential to justify a plaintiff's verdict in Federal Employers' Liability Act cases and the court must decide whether there is any evidence thereof. Of course a right to a jury trial

where there is any indication of negligence may present difficulties. There will be cases in which proof of negligence is clear and convincing. Others where it is doubtful but clearly a question for the jury and somewhere the quantum of such evidence approaches the vanishing point. The latter type necessarily will present difficult problems which are inescapable. *No such problem arises in this case where there is a total absence of negligence.*" (Emphasis supplied.)

The plaintiff used the tongs complained of before and after the accident here. If the tongs were defective, which is the inference asked to be drawn by the plaintiff, would Milom use them again within a short time of the occurrence which is the subject matter of this suit? If we are to deal solely in inferences how can we explain the uneventful use of the tongs within minutes after the accident, when we are asked to infer that they were defective thereby causing the accident? The only person able to supply any proof upon which to base the conjecture necessary to sustain the theory of the plaintiff's case was the plaintiff himself. This proof he has failed to supply. Can it not be inferred that if there was such proof available he would have presented it at the trial below? The failure of the plaintiff to prove his case under the Act should not be remedied by the substitution of a phantom theory based upon an imaginary concept of rights and liabilities.

The trial court was wrong in permitting the jury to indulge in sheer speculation in arriving at its verdict. It has repeatedly been held by the Supreme Court that before evidence may be left to the jury there is a preliminary question for the Judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly arrive at a verdict for the party producing it, upon whom the *onus* of proof is imposed. *Pennsylvania Railroad Company* v. *Chamberlain*, 288 U. S. 333, 343, 53 S. Ct. 391 (1933). The trial court ignored the proposition

that the employee must fail in his claim when he is unable to adduce sufficient proof to show negligence on the part of the employer.

The cause of an injury must be determined from the evidence adduced in the trial. A known occurrence may not be determined by proof and the cause by guess. The block of ice had been cut in two by the plaintiff some minutes before his injury. It is as logical to argue that Milom did not grip the ice properly, or that he allowed the ice to pivot in the tongs in the course of the lift, or that he jerked the ice loose, or that the cut made by Milom was irregular and caused an improper connection with the tongs, as it is to assume the tool was defective. It is common knowledge that ice is slippery by nature and melts when not subject to refrigeration. The fact, by itself, that the ice slipped does not create a presumption that the defendant was negligent in supplying defective tongs. This is so because no evidence was introduced as to the condition of the tongs. Milom's improper use of the tongs can be inferred with equal ease. The fact that Milom never had trouble with the tongs before the date in question, or after, adds credence to the conclusion that no defect existed. Any one of these assumptions is as warranted as the one obviously made by the jury. A function of the jury is to determine facts. This determination is made from the evidence; it is not a function of the jury to determine which of several possibilities is true when the determination is made by speculation, supposition, conjecture or guesswork. The defendant is entitled to the same consideration as is the plaintiff. The requirement of proof is a burden placed upon the plaintiff to protect the defendant from an unwarranted result arrived at by sympathy or speculation by the jury. As the Supreme Court of Illinois stated in the case of *Condon* v. *Schoenfeld*, 214 Ill. 226, 73 N. E. 333 (1905) at page 230:

> "It can not be said that the existence of a certain fact may reasonably be inferred from the evidence when the existence of another fact inconsistent with the first can be, from the same evidence, inferred with equal certainty. The evidence must point to the existence of some particular fact rather than to the existence of another fact inconsistent with the first before it can be said that such evidence alone tends to prove the existence of the first."

It is apparent that there was a total failure to show a connection between the defendant and the cause of the plaintiff's injury. There being no evidence of the slightest probative force as to what caused the accident complained of, no justifiable inference can arise concerning the condition of the tongs. This insufficiency in proof is fatal to the plaintiff's case. There must be evidence of negligence before the case may be properly left to the discretion of the jury. *Wadiak* v. *Illinois Central Railroad Company*, 208 F. 2d 925 (7th 1953); *Wetherbee* v. *Elgin, Joliet & Eastern Railroad Company*, 204 F. 2d 755 (7th 1953); *Kaminski* v. *Chicago River & Indiana Railroad Company*, 200 F. 2d 1 (7th 1952).

4. The Verdict Returned by the Jury Was Based Solely on Conjecture.

Only speculation can supply the absent proof in this case. What caused the injury to the plaintiff? Many possible answers can be suggested, each of which, on the facts of this record, is as probable and reasonable as the other. In choosing among these equally likely answers to the crucial question in this case, what guide is afforded by the evidence? What is there to render more probable the one possibility upon which liability could be predicated, rather than the innumerable other possibilities which would be incompatible with liability? No one can take the facts in this record and say they point with greater probability to facts

which would impose liability than to facts which would not. In appraising the probabilities, its seems clear that the tongs from their use before the accident and immediately after the accident, as well as their action in regripping the ice at the time of the accident, were not ineffective or defective. The large number of times that the tongs were made use of, without incident, and according to the plaintiff's own testimony, the use made of them by him immediately after the accident, justifies this appraisal. It is only assuming the least probable circumstances, as the jury apparently did, that a liability situation could arise. Therefore, the jury necessarily had to resort to speculation to supply an absence of proof in order to affix liability on the defendant. It is only conjecture that the tongs were defective and such conjecture does not take the place of direct evidence which is necessary to warrant an inference. This fact alone demonstrates that the jury went outside the record to hold the defendant guilty of negligence which proximately caused plaintiff's injury.

Counsel for the plaintiff presumed a defective condition was present in the tongs thereby causing the plaintiff's injury. This was necessary because the plaintiff never testified that any condition in the tongs existed which proximately caused his injury. In fact, he never mentioned the ice tongs when he reported the accident to his immediate superior (Appendix, Pages 41, 43 & 44). The jury would therefore have to take this presumption as a foundation to presume that the defendant was negligent in supplying Milom with the type of ice tongs used by him at the time of the accident. To sustain plaintiff's theory of cause and liability it requires presumption upon presumption, inference upon inference, and a total disregard of equally compatible views of the evidence. A verdict based on a record such as this, obviously is the result of speculation.

We are confronted with a situation where proven facts give rise to no inferences as to the cause of the occurrence. Conjecture may suggest a number of mutually inconsistent possibilities. The judgment, as a matter of law, must go against the party upon whom rests the burden of establishing something as a fact rather than as a possibility. *Pennsylvania Railroad Company* v. *Chamberlain*, 288 U. S. 333, 53 S. Ct. 391 (1933).

Whenever the facts, as established, will not support any inference of causation, the plaintiff has not maintained the propositions upon which he would be entitled to recover. Here speculation suggests various inconsistent propositions, therefore can it be said that a defective condition of the tongs has been established by legitimate proof? A verdict in favor of the party bound to maintain one of these propositions against the other is necessarily wrong when he has failed to sustain his burden. *Smith* v. *First National Bank of Westfield*, 99 Mass. 605 (1868).

It is submitted that on the undisputed evidence and reasonable inferences to be drawn therefrom, there is a total failure of proof as to how the accident happened and what the defendant's act or acts of negligence were. There is no conflict in the evidence because there is no evidence as to what caused the accident. Speculation was substituted for proof. This substitution the jury may not make. *Trust Company of Chicago* v. *Erie R. Co.*, 165 F. 2d 906 (7th, 1948).

In *Huff* v. *Illinois Central Railroad Company*, 362 Ill. 95, 199 N. E. 116 (1935), the plaintiff, an employee of the defendant railroad, was injured while operating a jack. The evidence disclosed that the jack worked properly while going up and worked properly for a notch or two on the way down. The court in holding that it was the duty of the plaintiff to prove the existence of the defect and that the defect was the proximate result of defendant's negligence said, at page 100:

"Whether the jack failed because of some worn or defective condition, or whether it failed because the plaintiff, as he testified, had the trigger off and held the jack lever with his foot, or whether it fell because of the breaking of some internal part or mechanism, are all matters of conjecture. There is no evidence as to what an inspection of the jack might have disclosed, nor as to whether or not it would have disclosed anything. So far as this record shows, the jack may have fallen by reason of some latent defect which could not have been discovered by any kind of inspection."

5. The Fact That an Accident Happens, or an Injury Is Sustained, Does Not Render the Defendant Liable Unless Its Negligence Caused the Injury.

Proof of injury does not by itself permit the plaintiff to recover a verdict under the Federal Employers' Liability Act. Liability arises from negligence under the Act. That negligence must be the cause of the injury. *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 67, 63 S. Ct. 444 (1942). The jury may not be permitted to speculate as to the cause of the injury, there must be evidence in the record upon which the jury may find the negligence which proximately caused the result complained of. A case, such as the one at bar, should have been withdrawn from the consideration of the jury because there was no evidence from which the inferences might have reasonably been drawn that the injuries suffered were caused by the negligent act of the defendant. *Atchison, Topeka & Santa Fe Railway Company* v. *Toops*, 381 U. S. 351, 50 S. Ct. 281 (1930).

The case of *Barnett* v. *Terminal Railroad Association of St. Louis*, 228 F. 2d 756 (8th, 1956), is particularly pertinent in this respect. In that case the plaintiff, an experienced car repairman and an employee of the defendant

railroad, filed suit under the Federal Employers' Liability Act for injuries allegedly sustained when an air hose blew apart. The evidence was that the plaintiff had just coupled the hose. The plaintiff's theory appeared to be that ice had accumulated inside the coupling thereby preventing a proper union. The court ruled that there was no evidence whatever that any ice had accumulated on the interior of this coupling and no testimony from which a jury could reasonably infer that the hose burst or came apart because of the presence of ice on the interior of the coupling. Such a conclusion could be based only upon conjecture, possibility, speculation or guess. In such circumstances it cannot be said that there is substantial evidence sustaining plaintiff's contention and hence as a matter of law plaintiff is not entitled to recover. *Wilkerson* v. *McCarthy*, 336 U. S. 53, 69 S. Ct. 416 (1949); *Pennsylvania Railroad Company* v. *Chamberlain*, 288 U. S. 333, 53 S. Ct. 391 (1933). The burden of proof is upon the plaintiff to prove the carrier guilty of negligence and that such negligence was the proximate cause in whole or in part of his injuries. *Wolfe* v. *Henwood*, 162 F. 2d 998 (8th, 1947).

The factual similarity and reasoning of the District Court of Pennsylvania in the case of *Kautz* v. *Delaware, Lackawanna & Western Railroad Company*, 129 F. Supp. 777 (1955), is persuasive here. In that case the plaintiff sued for injuries sustained when a locomotive tire fell from an overhead crane. The plaintiff had removed the tire from a locomotive and had left the general area to obtain a sandwich. When he returned to his place of work the tire was being moved by an overhead crane. While the movement was being made the tire fell from the crane striking the plaintiff. As a result he filed a suit against the defendant employer railroad company for the injuries he allegedly sustained as a result of the accident. No

evidence was introduced as to the occurrence other than that it took place. In granting a directed verdict for the defendant the court said at page 779:

> "The provisions of the Federal Employers' Liability Act require that plaintiff's injury be caused at least in part by the negligence of the defendant. In the absence of negligence of the defendant as a causal factor in plaintiff's injury there can be no recovery. Where plaintiff's evidence of negligence and causation amounts to nothing more than a scintilla, the Court must enter judgment for the defendant as a matter of law. *Brady* v. *Southern Railway Co.*, 320 U. S. 476, 64 S. Ct. 232."
>
> "• • • 'speculation can not supply the place of proof.'"
>
> "What did cause the tire to fall? There is no evidence of what caused it to fall and, consequently, a jury should not be allowed to speculate upon the reason."

The Supreme Court of the United States has said that the burden is upon the plaintiff to present probative facts from which negligence and causal relation could reasonably be inferred. The essential requirement is that sheer speculation not be permitted to do duty for probative facts after making an allowance for all reasonably possible inferences favoring the party whose case is attacked. *Myers* v. *Reading Co.*, 331 U. S. 477, 485, 67 S. Ct. 1334 (1947). Plaintiff's theory is apparently based upon the assumption that if he shows his injury resulted from the ice slipping down and the tongs slipping up it is enough to support a jury's finding of negligence on the part of the defendant. In the absence of evidence of negligence there is no basis for a jury's finding that it was some act of the defendant rather than the plaintiff that caused the accident. There is no evidence, either circumstantial or direct, from which negligence of the defendant can reasonably be inferred. The focal point of judicial review is the rea-

sonableness of the conclusion drawn by the jury. But here we can not find any reasonable basis to support the verdict. The plaintiff has completely failed to make out a case. Where negligence is the basis of the action, there is no choice but to apply the negligence test as it has been laid down by the Supreme Court, and in so doing, there can not be found any evidence sufficient to support a verdict here. *Boston & Maine Railroad Company* v. *Coppellotti*, 167 F. 2d 201 (1st, 1948).

In *Trust Company of Chicago* v. *Erie R. Co.*, 165 F. 2d 806 (7th, 1948), plaintiff, an employee of the defendant railroad, was found dead on the company premises. No evidence was introduced to show how plaintiff died or what caused the death. The Court of Appeals in sustaining a directed verdict for the defendant said, at page 809:

> "It is all speculation as to the manner in which decedent met his death. That is the trouble with plaintiff's case. One can speculate on how the accident happened, but where is the evidence as to how it did happen. Where is the evidence from which a reasonable inference could be drawn as to how it happened. Many reasonable hypotheses as to how the accident happened may be conjured up. But it is not reasonable hypothesis we are interested in but evidence from which reasonable inferences may be drawn * * * A jury may not speculate and formulate a plausible theory as to where the accident happened and how it happened and then speculate on what it was that the defendant did that was negligent and caused the accident."
>
> "In our case there is no conflict in the evidence. There is a woeful lack of evidence which will leave a jury to nothing but speculation. The plaintiff argues that there was death by the defendant's train. Therefore the defendant was negligent: This is arguing backward from effect to cause and not from cause to effect."

The mere occurrence of an injury gives no rise to a presumption of negligence. In *Van Ripper* v. *New York Central*, 227 F. 2d 823 (6th, 1955), the plaintiff, an employee of the defendant railroad, was injured when a sandbox lid fell on his hand. It appears that the plaintiff, a locomotive engineer, had opened a sandbox on the engine to determine if sufficient sand was aboard for use on a forthcoming operation. The lid of the box, when opened, was held up by a steel rod attached by a swivel to the inside of the box. As far as the plaintiff knew there was nothing defective in the sandbox cover or the rod holding it open. There was no evidence of any defect in the sandbox. Consequently, the court held that the trial judge was correct in directing a verdict for the defendant.

It can not be disputed that the defendant is not an insurer of the employee's safety. The mere happening of the injury raises no presumption of negligence, and there can be no recovery in the absence of proof of negligence. *Moore* v. *Chesapeake & Ohio Railroad Company*, 340 U. S. 573, 71 S. Ct. 428 (1951), *McCracken* v. *Richmond, Fredericksburg & Potomac R. Co.*, 240 F. 2d 484 (4th, 1957).

6. Plaintiff's Own Voluntary Acts Constituted the Sole Proximate Cause of His Negligence.

Milom was the best judge of the condition of the ice tongs. The fact that he did lift the ice with the tongs demonstrates that he thought he could lift it without injury, or at least shows that no one else can be charged with negligence in connection therewith. Reasonable care does not require the defendant to be a better judge of the conditions of a tool under the control of the plaintiff. If Milom is now claiming that the defendant should have foreseen injury to him, why did he not foresee it himself? He was the only one in a position to judge and the record is devoid of proof that the defendant had knowledge of

any defect in the tongs or that the tongs were in fact defective.

In all probability, however, Milom did not anticipate injury when he undertook to lift the ice. Milom's testimony is that he had been handling ice for thirteen years for the defendant. An objective appraisal of the situation indicates that Milom did not expect to hurt himself. It is unlikely that he knowingly undertook an act which he expected would injure him. If this is so and Milom did not anticipate injury, it is inconceivable that he can be heard to contend now that someone *else* should have foreseen it. While it is true that ordinarily contributory negligence does not bar recovery, but affects only the amount of recovery in an action under the Federal Employers' Liability Act, where a plaintiff's negligence is the sole proximate cause of his injury he can not recover. *Atlantic Coast Line Railroad Company* v. *Dixon*, 189 F. 2d 525, 527 (5th, 1951).

7. Recent Decisions of the United States Supreme Court Do Not Prevent Courts of Review from Determining Whether There Is Any Evidence to Support a Jury Verdict.

We are familiar with the recent Supreme Court decisions which seem to modify the concept of negligence in Federal Employers' Liability Act cases. *Webb*, v. *Illinois Central Railroad Company*, 352 U. S. 503, 77 S. Ct. ..... (1957); *Rogers* v. *Missouri Pacific Railroad Company*, 352 U. S. 493, 77 S. Ct. ..... (1957). The *Webb* and *Rogers* cases are a continuation of the doctrine previously laid down in *Lavender* v. *Kurn*, 327 U. S. 645, 66 S. Ct. 740 (1945).

In *Webb* the plaintiff fell when he slipped on a clinker. In *Rogers* the plaintiff fell from a culvert when he stepped back to avoid a train while he was burning weeds. In both

cases there was proof of the condition, or conditions, which caused the injuries: in *Webb* the condition was the presence of the clinker; in *Rogers* the conditions consisted of the presence of the culvert, the train and the use of the weed burner.

The question on review in *Webb* was not the cause of the injury but whether or not the defendant knew, or should have known, of the cause *which had been proved*. In *Rogers* the questions on review were not the physical cause of the injury but whether or not the defendant should have foreseen injury and whether or not the occurrence was the proximate result of the physical condition *which had been proved*.

In the case at bar if there had been proof that the tongs were defective then the issues would have become: (1) was the occurrence foreseeable; and (2) was there actual or constructive notice of the defect. In the absence of this indispensable proof the decisions of *Webb* and *Rogers* are not parallel to the case now before this court. Indeed, in the *Webb* and *Rogers* cases the Supreme Court indicated that once there is proof of the existence of the physical conditions which caused the injuries *then* jury questions arise as to notice, foreseeability and proximate cause. Thus, the Supreme Court did not authorize the jury to supply absent facts to establish the physical conditions causing the injury.

Conclusion.

Nowhere in the record is there any evidence of negligence on the part of the defendant that, in whole or in part, proximately caused plaintiff's injuries. The plaintiff has failed to sustain the burden of proof in establishing negligence by evidence adduced at the trial. The record is completely silent as to the condition of the ice tongs.

We respectfully urge the court to reverse the judgment of the lower court.

Respectfully submitted,

MARVIN A. JERSILD,
MARTIN J. KEATING,
Attorneys for Appellant.

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1 IN THE UNITED STATES DISTRICT COURT

Northern District of Illinois,

Eastern Division.

Henderson Milom,
Plaintiff-Appellee,

vs.

New York Central Railroad Company, a corporation,
Defendant-Appellant.

No. 55-C-1276.

PREFIX TO RECORD UNDER RULE 12C OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Action commenced: August 26, 1955.

Parties: Henderson Milom, Plaintiff; New York Central Railroad Company, a corporation, Defendant.

Pleadings: Complaint filed August 26, 1955; Answer filed September 19, 1955; Plaintiff's Amended Complaint filed April 10, 1956; Defendant's Answer to Amended Complaint filed April 18, 1956; Plaintiff's Amended Complaint amended on its face December 4, 1956; Defendant's Motion for judgment notwithstanding the verdict or in the alternative for a new trial filed on December 17, 1956; Defendant's Motion for judgment notwithstanding the verdict or in the alternative for a new trial denied on January 8, 1957.

Trial: Jury, before Honorable Philip L. Sullivan, December 4, 1956; evidence heard and concluded; verdict for plaintiff and damages in the sum of $7,500 rendered December 7, 1956.

Judgment: Judgment on the verdict in the sum of $7,500 entered on December 7, 1956.

2 Appeal: Taken by filing Notice of Appeal February 7, 1957.

Marvin A. Jersild,
Martin J. Keating,
Attorneys for Defendant-Appellant,
1236 LaSalle Station,
WAbash 2-4200.

IN THE UNITED STATES DISTRICT COURT

Northern District of Illinois,

Eastern Division.

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3 Pleas and Proceedings had before the Honorable Philip L. Sullivan, Judge of the United States District Court for the Northern District of Illinois, Eastern Division, at a term of said court began and held in the United States Court House in the City of Chicago, Illinois, to wit:

Henderson Milom,
vs.
New York Central Railroad Company. } No. 55-C-1276.

Be it remembered that heretofore on the 26th day of August, 1955, there was filed in the office of the Clerk of this Court at Chicago, Illinois, a complaint in the above entitled cause, which complaint reads in the words and figures following, to wit:

IN THE UNITED STATES DISTRICT COURT.
* * (Caption—55-C-1276) * *

AMENDED COMPLAINT.

(Filed April 10, 1956. Roy H. Johnson, Clerk.)

9 Now comes Henderson Milom, plaintiff herein by Epstein and Wilsey, his Attorneys, and complains of the defendant, New York Central Railroad Company, a corporation, and alleges as follows:

1. That on or about, to-wit: November 16th, 1954, the defendant, New York Central Railroad Company, a corporation, was and for a long time prior thereto, had been a common carrier by railroad, engaged in commerce and transportation, between the State of Illinois and other States of the United States.

10 2. That on said date aforesaid, the plaintiff was an employee of the defendant and at the time of the accident hereinafter complained of which occurred on said date the plaintiff was then and there working at the defendant's premises, on train #17, which train was travelling between New York City and Chicago, Illinois, and which train was then and there owned by the said defendant in interstate commerce and by reason of the foregoing, this cause of action stated is governed by the Federal Employees' Liability Act and by the Federal Safety Appliance Act and that this action is hereby brought under and within the purview of said Acts.

3. That the said defendant owned, operated, maintained and controlled its said railroad system and the appurtenances thereto, and the tools and working conditions provided by said defendant railroad to and for the said plaintiff for the purpose of enabling the plaintiff to perform his duties within the capacity of his employment by the said defendant railroad; and it was then and there the

duty of the said defendant to provide and furnish the plaintiff with safe working conditions and tools so as not to cause injury to the plaintiff in the performance of his duties, but that nevertheless, on or about the date aforesaid, and at or about the place aforesaid, the said defendant, negligently, carelessly and improperly caused or permitted the following acts of negligence:

11 (a) Maintained and provided the plaintiff with defective ice tongs;

(b) Maintained and provided plaintiff with a large block of ice weighing about fifty (50) pounds which contained hollow air holes or blisters and constituted a dangerous and hazardous object in connection with plaintiff's employment by said defendant;

(c) Maintained, operated and controlled said railway coach or dining car without proper covering of the floor thereof, so that in the course of plaintiff's employment, plaintiff was required to lift said block of ice to a ledge on the side or wall of said dining car so that the floor would be kept free from ice, water and slush;

(d) Improperly and negligently maintained and controlled said dining car by the presence of said ledge along the wall or side thereof, and requiring plaintiff, in the course of his duties, to lift said large block of ice thereon;

4. That on or about the date aforesaid, and while said plaintiff was so employed by the defendant, and in the act of icing the pantry, of said railroad train, and while the plaintiff was in the exercise of all due care and caution for his own safety in all matters herein expressed, and while said plaintiff was using the ice tongs furnished him by the said defendant and engaged in the act or process of lifting a large block of ice from the floor of said railroad train or coach to the ledge about three and one-half (3½) feet above the floor, that by reason of the dull and imperfect and de-

fective condition of said ice tongs and likewise by reason of the defective condition of said block of ice which then and there contained a large air bubble or hole in the interior
12 thereof, that as a direct and proximate result of said dangerous and hazardous conditions, said block of ice was; caused to slip from the tongs and that as a further direct and proximate result thereof, plaintiff sustained grave and serious injuries to his left hand and to the ligaments and tendons thereof which became sprained and strained.

5. That the said defendant owned, operated, maintained and controlled its said railroad system on and prior to the date aforesaid and owned, operated, controlled and maintained the aforementioned railroad train and that as a direct and proximate result of the aforesaid acts of negligence, of the said defendant, or of one or more thereof, said plaintiff, who was at all times herein stated, free from any negligence or contributory negligence whatsoever and while the plaintiff was in the execution of all due care and caution for his safety, sustained grave and serious injuries to his body and to his nervous system and to his musculature.

6. That by reason of the foregoing, and as a direct and proximate result thereof, while plaintiff was performing his duties as aforesaid, the plaintiff sustained severe and permanent injuries as a result of which he was confined to the hospital for a long period of time and was caused to undergo extensive surgery, and that by reason of said injuries plaintiff has suffered, and with reasonable certainty will continue to suffer great pain and anguish, and he has
13 been and will be permanently hindered from attending to his usual affairs and duties and he has been and will be deprived of large earnings and profits, and he has been and will be compelled to expend large sums of money for care and treatment of his injuries.

Wherefore, plaintiff, Henderson Milom, brings this suit and asks judgment in the sum of Thirty Thousand Dollars ($30,000.00).

Henderson Milom,
By .....
His Attorneys.

Epstein and Wilsey,
Attorneys for Plaintiff,
100 N. La Salle Street,
Financial 6-0285.

And afterwards, to wit, on the 18th day of April, 1956, the following further proceedings were had in the above entitled cause, to wit:

14 ANSWER OF NEW YORK CENTRAL RAILROAD COMPANY TO PLAINTIFF'S AMENDED COMPLAINT.

The defendant, New York Central Railroad Company, in answer to plaintiff's amended complaint says:

1. Defendant denies the allegations of paragraph 3, and the subdivisions thereof, other than the allegation that it owned, operated, maintained and controlled a certain railroad system at the time mentioned in the said paragraph.

2. Defendant denies the allegations of paragraph 4.

3. It denies the allegations of paragraph 5 except the allegation that it owned, operated, maintained and controlled a certain railroad system on the date mentioned in said paragraph.

4. It denies the allegations of paragraph 6.

5. It denies that defendant was careless or negligent in any of the respects alleged in the complaint.

15 6. It denies that plaintiff was injured as a result of any negligence, carelessness or improper conduct on the part of the defendant.

7. It alleges that the injuries, if any, sustained by the plaintiff were the proximate result of his own negligence and want of due care.

8. It alleges that the injuries, if any, sustained by the plaintiff were the sole proximate result of his own negligence and want of due care.

9. It alleges that the injuries sustained by the plaintiff, if any were sustained, were not the result of any negligence or improper conduct on the part of the defendant.

10. It denies that the plaintiff suffered the injuries and damages alleged in the complaint.

Marvin A. Jersild,
Attorney for Defendant,
1236 La Salle Station,
WAbash 2-4200.

48 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—55-C-1276) * *

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the Honorable Philip L. Sullivan, one of the judges of said court, and a jury, at Chicago, Illinois, commencing on December 4, 1956.

Appearances:

Mr. Leo K. Wykell appeared on behalf of the plaintiff;

Mr. Martin J. Keating appeared on behalf of the defendant.

49 The Court: I may say to you men and women of the jury, in view of the fact that one of the jurors, as I recall, has mentioned Illinois Workmen's Compensation, that this case has nothing to do with the Illinois Workmen's Compensation Act. This is under an Act passed by Congress which has to do between railroads and their employees. So they are governed entirely by different rules than under the Compensation Act.

You may proceed.

Thereupon the plaintiff, to maintain the issues on his part, offered and introduced the following evidence:

EDWARD CLEMENTS, called as a witness on the part of the plaintiff, being first duly sworn, testified as follows:

The Court: What is your name?
The Witness: Edward Clements.
The Court: Where do you live?
The Witness: 5316 Michigan.
The Court: What do you do?

50 The Witness: I am a waiter, New York Central.

The Court: New York Central Railroad?

The Witness: Yes.

The Court: You may proceed.

Direct Examination by Mr. Wykell.

Q. Were you employed as a waiter by the New York Central on November 16, 1954?

A. I was.

Q. What run were you on?

A. Wolverine, 8 and 17.

Q. Were you a witness to an unusual occurrence that happened to Mr. Milom on that day?

A. I was there when it happened, sir.

Q. Where did it happen?

A. In the New York Central Yards there.

Q. In Chicago or New York?

A. In New York, 161st and Morris Avenue.

Q. How long have you been employed by the New York Central Railroad?

A. 46 years last Easter.

Q. Now, Mr. Clements, I understand it was customary while the train was in the yard that the crew would leave the train; is that correct?

51 A. They would leave the train, that is true enough. They were not paid to stay there. And different crews, different hours.

Q. Did you leave the train?

A. I did not. I stayed there.

Q. Were you there when Mr. Milom arrived?

A. Oh, yes.

Q. Who was there at that time when he got there?

A. Oh, I don't just remember now. The steward was there.

Q. Who was the steward on that day?

A. George Morrell.

Q. Was there anybody else there?

A. Yes, some of the cooks was out in the kitchen. I don't know who they were, their names.

Q. What was Mr. Milom doing there? What was his job on that run?

A. To put away supplies and get in ice, and get in things necessary to complete the room.

Q. Did they have a name for the person who did that?

A. A pantry man.

Q. Now, where did this happen in the car, in the pantry?

52 A. In the pantry.

Q. How did you happen to be in the pantry?

A. Taking care of my business as a silver man.

Q. What is the first notice that you had that anything had happened?

Mr. Keating: Your Honor, counsel has been leading the witness for some time.

Mr. Wykell: I will reframe the question.

The Court: All right.

By Mr. Wykell:

Q. Will you tell us what you saw there in the pantry?

A. I just saw him bring in the ice, and I am not watching what he is doing, bringing it in, and in a minute or so when I heard the commotion, he was hurt. That was all.

Q. What did you hear?

A. Scuffling with the ice, it got loose, and he scuffled around, trying to handle it, and I turned around.

Q. When you turned around toward him, what did you see?

A. I saw he was injured.

Q. Did you see him do anything?

53 A. Only going to work, trying to get first aid to help himself. That was about all.

Q. Did you see any ice there?

A. Oh, yes.

Q. Where was the ice?

A. It was on the floor.

Q. Did you see any ice tongs there?

A. Yes, I saw some ice tongs.

Q. Did you look at the ice tongs?

A. No, I didn't examine them.

Q. I did not ask you if you examined them.

A. I just saw them, yes.

Q. You did see them?

A. Yes.

Q. Where were they?

A. When I saw them the first time, he was pulling ice with them. The next time they was on the floor.

Q. Did you see him pick them up off the floor?

A. No.

Q. Did you pick them up off the floor?

A. No, somebody picked them up, somebody around there.

Q. You saw them lying there on the floor?

A. That is right.

54 Q. Did Mr. Milom say anything to you about them?

A. No.

Q. Or say anything to you at all?

A. No.

Q. Did you say anything to him?

A. No, we don't say nothing about that. It just happened.

Mr. Wykell: Mark this Plaintiff's Exhibit 1 for identification.

(Exhibit so marked.)

By Mr. Wykell:

Q. Mr. Witness, I hand you what has been marked Plaintiff's Exhibit 1 for identification and ask you to look at that.

A. I could not say they were the same ones, but that looks like them.

Q. All I asked you to do is to look at them.

A. Yes.

Q. Will you look at them, please?

A. Yes.

Q. Now, do these tongs look like the tongs that you saw on the floor in the pantry on the 16th of November, 1954?

A. Yes, sir.

55 Q. Do they look exactly like them?

A. As nearly as I could say.

Q. Was there red paint on them?

A. Yes.

Q. Were they shaped this way?

A. Yes, sir.

Q. And was the degree of sharpness of the blades about the same?

Mr. Keating: I object to that question, your Honor.

The Court: Sustained. He has already answered the question.

Mr. Wykell: All right. If the Court please, I will offer into evidence Plaintiff's Exhibit 1 for identification.

Mr. Keating: I object. There has been no showing that these are the tongs. They just look like them. The witness has been unable to identify them, except that they have a similar appearance.

The Court: I will reserve my ruling until the plaintiff takes the stand.

Mr. Wykell: All right.

By Mr. Wykell:

56 Q. Did you see Mr. Milom the following day?

A. Yes.

Q. What did you notice about his hand, if anything?

A. It was swollen considerably.

Q. Did Mr. Milom work dinner that night?

A. At night?

Q. That evening.

A. Well, I don't know. I can't remember. It has been quite some time.

Q. Do you know whether or not he worked breakfast the next morning?

A. No, I don't think he did.

Q. What is that?

A. I don't think he did.

Mr. Wykell: You may inquire.

Cross-Examination by Mr. Keating.

Q. Mr. Clements, where were you standing when you heard this commotion you described?

A. Standing with my back toward him—he was facing that way—doing my work.

Q. Will you describe to us a little more in detail 57 what this commotion consisted of?

A. Only thing I know, the man was trying to get the ice up there, and it got away from him, and he got hurt. That is all I know.

Q. Did you see the ice slip?

A. No, just heard it.

Q. What did you hear?

A. Oh, the noise. If you pick up a piece of ice and it slips and falls, you hear it.

Q. Did the ice fall on the floor?

A. I am pretty sure it did.

Q. Did you hear it fall on the floor?

A. Yes.

Q. Did you go and look at the ice?

A. No, sir.

Q. Did the ice break when it fell on the floor?

A. That I don't know. I was not paying that much attention.

Q. How close were you to the ice?

A. Well, I would judge about there, about that length (indicating).

Q. About 15 feet?

Mr. Wykell: Oh, no, he has not stated 15 feet.

58 By Mr. Keating:

Q. How many feet?

Q. Have you been in one of those pantries over there?

Q. How many feet would you say?

A. I would say just about from here to the end of that table right there.

Mr. Wykell: Pardon me just a minute. I want to get that. To the end of this table?

The Witness: That is right.

Mr. Wykell: The one I am pointing to?

The Witness: Yes.

Mr. Wykell: From where you are seated to here?

The Witness: Yes, I would say about that distance. I don't know what that would measure.

Mr. Wykell: About five feet?

Mr. Keating: Let the record show five feet.

By Mr. Keating:

Q. How far were you from the tongs, Mr. Clements?

A. That I could not say, your Honor. I did not

59 get down to walk and measure and see how far it was, because it did not interest me.

Q. Did you ever see Mr. Elliott here before?

A. Yes, I think I do now, since he looked at me.

Q. Did you ever give Mr. Elliott a statement?

A. Yes.

Q. Do you remember approximately when that statement was given?

A. No.

Mr. Keating: Mark this Defendant's Exhibit 1.

(Document marked for identification Defendant's Exhibit 1.)

The Court: Have it identified.

By Mr. Keating:

Q. I show you Defendant's Exhibit 1, Mr. Witness, and ask you if that is your signature?

A. That is right.

Q. And is that your signature?

A. That is right.

Q. Was the train moving at the time you heard this commotion?

A. I don't think so. I don't know. I could not say truthfully.

60 Q. Who is Legs?

A. That was him.

Q. Mr. Milom?

A. That is right.

Q. When did you first meet Mr. Milom?

A. Oh, I don't know. A number of years ago.

Q. Did you always know him as Mr. Milom?

A. No.

Q. What did you know him as?

A. Legs.

Q. When did you know his name was Milom?

A. The night after this gentleman talked to me.

Q. After Mr. Elliott talked to you?

A. Yes, come to me that night.

Q. The night you gave the statement?

A. I gave him a statement. In the afternoon I was en route to New York, and that night he come to me, and that was him.

Q. That was the first time you knew the name of Mr. Milom instead of Legs?

A. That is right.

Q. Do you remember telling Mr. Elliott in your statement that you were not a witness to the injury?

A. No, I didn't tell him that. I told him I didn't
61 know nothing about it, and I didn't at the time; but when he come to me and I saw him the next time, I told him, if he had said Legs, I would have known who it was.

Q. You gave Mr. Elliott two statements, did you?

A. Yes, that is right. I didn't give him no statement. I told him what I saw about it.

Q. You signed the statement?

A. Yes.

Q. Do you remember saying in the second statement you were not a witness to the injury?

A. No, I didn't. How could I say that when I went to work and told the gentleman that I knew the man? He could not put anything in the statement as far as that, but I don't think he would do that.

Q. Just answer the question I asked you. You don't remember saying you were not a witness to the injury?

A. No. How could I say I was not a witness? I couldn't.

Q. You didn't pick up the tongs or inspect them after the accident, did you?

A. No, sir.

Q. Had you ever used tongs in that car before the
62 date of this accident?

A. Mister, I told you I have been there 46 years and done everything on the road.

Q. You see, the jury may not know whether you used tongs. Have you ever used tongs?

A. Certainly.

Q. Did you ever use the tongs Mr. Milom was using on the day of the accident?

A. I don't think so. I don't know whether they get tongs every two days or minutes.

Q. Do you know from your own knowledge whether or not the ice slipped in Mr. Milom's hands?

A. No, sir, I really don't know. I am working this way, and the man is working there. I don't know, but I just know he was hurt; that was all.

Q. You just know he was hurt, but you don't know how it happened?

A. No. How could I tell?

Mr. Keating: That is all.

(Witness excused.)

The Court: I will not be able to go ahead with anything further at this time, today.

You will not talk about this case, even between or among yourselves; and, of course, you will not permit
63 anyone to talk to you about it. If anyone should attempt to talk to you about it, report it to the Court at the first opportunity. I caution you further not to express an opinion concerning the merits of the case until you go to the jury room for that purpose after the case has been concluded. You may go now until tomorrow morning at 10:00 o'clock. Return to your jury room a little bit before 10:00 o'clock tomorrow morning. You may retire.

(Whereupon an adjournment was taken to 10:00 o'clock A. M. of the following day, December 5, 1956.)

64 December 5, 1956
10:00 o'clock A. M.

Trial resumed pursuant to adjournment.

Present:

Mr. Leo K. Wykell on behalf of the plaintiff;

Mr. Martin J. Keating on behalf of the defendant.

65 HENDERSON MILOM, the plaintiff, called as a witness in his own behalf, being first duly sworn, testified as follows:

The Court: What is your name?
The Witness: Henderson Milom.
The Court: Where do you live?
The Witness: 727 East 60th Street.
The Court: You are the plaintiff in this suit?
The Witness: Yes, sir.

Direct Examination by Mr. Wykell.

Q. What is your business or occupation?
A. Dining car waiter, New York Central Railroad.
Q. How long have you been so employed?
A. Approximately 15 years.
Q. Were you involved in an unusual occurrence on November 16, 1954?
A. Yes, I was, sir.
Q. Where did that take place?
A. In the Mount Haven Yards, in New York City.
Q. You were in New York on a regular run, is that correct?
A. Yes, sir.
66 Q. On the Wolverine?
A. Yes, sir.

Q. And this occurred preparatory to your return trip to Chicago, is that correct?

A. Yes, sir, it did.

Q. What were your particular duties on the day in question?

A. I was a dining car pantryman.

Q. Did you normally and regularly serve as a pantryman?

A. No, sir, I did not.

Q. Who was the usual pantryman on that trip?

A. Mr. Eddie Clark.

Q. And what were the duties of a pantryman at that time?

A. The duties of a pantryman were to order supplies, receive the supplies, put them away, ice up vegetables, fruits, fruit juices and butter.

Q. What time was the train due to go back to Chicago?

A. It was due to leave New York at 6:10 in the evening.

Q. What time were you required to report for work?

A. 3:00 P. M.

67 Q. And what time were the waiters required to report for work?

A. 4:00 o'clock, or 4:15.

Q. What time did you report to work that day?

A. 3:00 o'clock.

Q. Were there any other members of the crew that were present at that time?

A. Well, yes. Of course, the chef, the cook, one waiter there, Eddie Clements, and myself.

Q. Was Clements required to be there at that time?

A. No, sir.

Q. Do you know how he happened to be there?

A. Well, he and several other waiters sometimes don't care to leave the train, and they can get a couple of hours'

nap, and if they have side work to do, they would do that, which would help them to be that far ahead of themselves.

Q. Where did you receive the ice that you used to ice up as you were required to do by your duties?

A. The ice is put on the back platform of the dining car. My duty was to bring the ice into the pantry, store some of it away for use further down the line if we
68 needed it, and to ice the vegetables and the juices and the butter.

Q. What tools or equipment were given to you for the purpose of handling the ice?

A. They have ice tongs, a pair of ice tongs, and ice picks.

Q. Were you given a set of ice tongs?

A. Yes. A set is one pair of ice tongs.

Q. One pair?

A. A pair, yes.

Q. And an ice pick?

A. Yes, sir.

Q. Who supplied that?

A. The company supplied that.

Q. And are you required to pick them up on every trip, or how do you get them?

A. The ice tongs?

Q. The ice tongs.

A. You know, the dining car is equipped with that just as they are with cooking utensils.

Q. You have been with the road for 15 years, is that correct?

A. Yes.

Q. Were you familiar with the custom and practice of inspecting or sharpening ice tongs on the New York
69 Central Railroad?

A. No, sir.

Q. I say, were you familiar with the custom and practice?

A. Yes, sir.

Q. And what was the custom and practice of the New York Central Railroad with reference to inspecting the ice tongs?

A. What is their practice?

Q. What was their practice? Did they make inspection of the ice tongs?

A. Not of my knowing since I have been there.

Q. And what was the custom and practice with reference to sharpening ice tongs?

A. None that I know of, sir.

Q. Where did you get the set of ice tongs that you used on this occasion?

A. Out of the pantry.

Q. Where were they located in the pantry?

A. Under the water glasses, where there is a tub where you wash the glasses, a little compartment underneath there is where the ice tongs were.

Q. And the ice tongs were in there?

A. Yes.

70 Q. And the ice, you say, was located on the rear platform?

A. Yes.

Q. What size piece of ice was there there?

A. Oh, it was, I guess, 100-pound blocks.

Q. Did you take all of the 100-pound block on that occasion?

A. No, sir.

Q. What did you do?

A. I used the pick and cut that in half.

Q. Was that ice scored? Do you know what I mean by that?

A. No, I don't understand you.

Q. Did it have a line cut in it so that it could be divided into equal portions?

A. Yes, it did.

Q. Do you know what size a complete cake of ice is as it comes from the ice company? Were you familiar with it?

A. I believe—

Mr. Keating: We object to that.

By Mr. Wykell:

Q. Just yes or no.

71 A. Yes.

Mr. Keating: There is no testimony so far that any ice—

The Court: I don't hear you.

Mr. Wykell: His objection was to my question assuming it came from the ice company. He is right. There has been no evidence here where it came from.

By Mr. Wykell:

Q. Were you familiar with the size of the blocks of ice, wherever they came from, as they were delivered?

A. Yes, sir.

Q. Were you familiar with the weight of a complete block of ice as they were delivered to the back platform?

A. By lifting, or size of it?

Q. No, do you know the weight?

A. Yes, sir.

Q. And what was the weight of a complete block?

A. This particular piece, sir?

Q. No. Was this a whole block?

A. This was about 100-pound block, but they do come in about 250; that is about the largest piece they put

72 out, sir.

Q. In any event, you divided this piece in half?

A. Yes.

Q. Then what did you do?

A. I used that ice tongs to drag it from the platform into the pantry.

Q. And about how far was that?

A. Oh, I would say about 12 to 15 feet, perhaps longer.

Q. What is that?

A. Perhaps longer. I would say from here to the swinging gate there.

Q. From you to the swinging gate over there?

A. Yes.

Mr. Wykell: About 22 feet, 20 to 22 feet.

By Mr. Wykell:

Q. And what type of material was there in the floor of the car over the area through which you took this piece of ice?

A. Nothing but the metal floor.

Q. Metal floor?

A. Yes.

Q. Now, did you lift the ice, or how did you—

73 Mr. Keating: Object. He already testified he dragged it.

Mr. Wykell: Dragged it. I was not sure.

By Mr. Wykell:

Q. Where did you take it?

A. I carried it into the pantry.

Q. Did you carry it or drag it?

A. Well, dragged it in.

Q. Was there anyone in the pantry at that time?

A. At that time? No.

Q. Did anyone come in afterwards?

A. Mr. Eddie Clements came in.

Q. So, you got the ice into the pantry. What did you do then?

A. I regripped the ice to lift.

Q. What do you mean you regripped the ice?

A. Well, bringing the ice in, 50-pound block would be approximately that long (indicating).

Mr. Wykell: Indicating about 26 to 28 inches.

By Mr. Wykell:

Q. All right.

A. Dragging it in, we catch it by the long end of it, 74 which is much easier to drag. When we get it inside, we lift it from about the middle—if this was the 50-pound block of ice, we would drag it from this end. After getting it in there, we would pick it here; you can get a better leverage in the center.

Q. Indicating about the center?

A. Yes. I proceeded to lift it to this ledge.

Q. All right. How many hands did you use for that purpose?

A. Two hands.

Q. And this ledge that you were lifting it to is about how high?

A. Oh, I would say about four feet.

Q. Then what happened?

A. When I got the ice near the top of the ledge, the tongs slipped.

Q. When you say the tongs slipped, what do you mean?

A. Well, from the grip that I had, it slipped upwards. The ice slipped down through the tongs, I would say that.

Q. What did you do?

A. Well, like a soft shoe dancer, I balanced myself 75 to try to keep the ice off of my feet.

Q. What did you balance yourself with?

A. On the top of this ledge that I was trying to lift the ice to.

Q. What did you do with your left hand?

A. I held to the ice tongs with my left hand. The tongs regripped in the ice before it hit the floor, which gave a jerk or snap to my wrist.

Q. Did the ice make any noise when it came to the floor?

Mr. Keating: Objection, your Honor. There has been no testimony by this witness that the ice went to the floor, yet.

Mr. Wykell: He said it went to the floor. Will you reread his last answer?

The Court: What is the fact?

Mr. Keating: May we have the answer read back? I don't believe the witness said the ice went to the floor. Counsel asked him if it made any noise when it hit the floor.

Mr. Wykell: We will clarify that.

By Mr. Wykell:

76 Q. Did the ice go all the way to the floor?

A. Regripping I let it fall to the floor, sir.

Q. Did it make any noise?

A. Yes, a blunt sound.

Q. Did the ice fracture or crack?

A. Well, small pieces could have.

Q. Well, did it? Do you recall?

A. Yes.

Q. What is the fact?

A. There was small pieces of ice.

Q. Now, how had you felt before this happened?

A. I felt perfectly fine.

Q. How did you feel immediately after it happened?

A. Immediately after it happened I began to get a stinging or blurring sensation, sir.

Q. Where?

A. In my hand, the back of my hand, up in the wrist.

Q. Which hand?

A. My left hand.

Q. You mean it went from the hand up to the wrist?

A. Yes.

Q. Did you get the ice up on the shelf?

77 A. Yes, sir.

Q. Now, after this happened, did you look at the tongs?

A. Yes, I looked at the tongs, sir.

Q. Mr. Milom, I will ask you to look at Plaintiff's Exhibit 1 for identification, and I will ask you whether or not Plaintiff's Exhibit 1 for identification conforms in physical shape and outline to the tongs that you used on the occasion in question?

A. Exactly, sir, except for maybe a little more paint or a little more rust, or less paint or less rust.

Mr. Wykell: I will reoffer in evidence Plaintiff's Exhibit 1 for identification.

Mr. Keating: Your Honor, I have no objection to counsel's offer if it is agreed and understood that these are not the tongs.

Mr. Wykell: Oh, definitely.

Mr. Keating: That they are similar tongs?

Mr. Wykell: Definitely. They are merely shown

78 to show the outline and configuration.

The Court: They may be received.

Mr. Keating: I withdraw the objection I made yesterday.

(PLAINTIFF'S EXHIBIT 1 was received in evidence.)

By Mr. Wykell:

Q. You say you got the ice up on the shelf, is that right?

A. Yes, sir.

Q. And then did you go ahead and perform the rest of your duties?

A. Yes, I did, sir.

Q. Now, in addition to the duties that you have outlined to us, did the pantryman have any service duties?

A. Yes. The pantryman has the No. 1 station in the

dining car, and waits table after getting the pantry prepared.

Q. Did you serve the evening meal?

A. Yes, sir, I served the evening meal.

Q. How did you feel during that time?

A. Well, my hand was very painful. It was swollen. The steward noticed it and wanted to know how did
79 I feel, could I make the evening meal, and I said I would try to go through with it, and I did.

Q. Did you tell anybody after this accident what happened?

A. I told the steward immediately.

Q. Who was the steward?

A. Mr. Clyde Morrell.

Q. And after you were through with your serving, did you have any other duties to perform?

A. Other than tearing down the pantry, as we call it.

Q. You mean putting away all the things?

A. Putting away all the juices, the fruits, the butter.

Q. About what time were you through with your work that evening?

A. About 10:30, sir.

Q. How did you feel at that time?

A. Well, my hand was giving me a pretty rough time, sir.

Q. What do you mean by that?

A. It was paining, it was sore, it was tight, sir.
80 Q. Did you work the following morning?

A. No, sir. The steward looked at my hand, and I told him how much pain it was giving me, and he told me not to work that morning.

Q. How did you sleep that night, by the way?

A. Well, practically none, sir, from the pain.

Q. Did you do anything for your hand or did anyone else do anything for your hand?

A. Well, one of the fellows suggested putting hot water and cooking salt into a pot, and soaking my hand, to see if that would ease any of the pain.

Q. Did you do that?

A. I did, sir.

Q. Did it ease your pain?

A. A little, yes.

Q. When you got to Chicago, what did you do?

A. I got off the train at the LaSalle Street Station, went up to the fifth floor, I believe it was, to the company's doctor, Dr. Kitzner.

Q. Was the company doctor the first one you saw that morning, or were there any other officials of the company you saw?

A. No, the company doctor first.

Q. The company doctor?

81 A. Yes, sir.

Q. What did Dr. Kitzner do for you, examine your hand?

A. Dr. Kitzner examined my hand.

Q. Did you tell him how you felt?

A. Yes, I told him exactly how I felt.

Q. What did he do?

A. He suggested getting epsom salts, salt crystals; he said to carry them home and have my wife bathe my hand in it, and put hot towels to it, sir.

Q. Did you do that?

A. I did that, sir.

Q. By the way, what was the appearance of your hand the morning you went in to Dr. Kitzner?

A. Well, the hand was swollen. You couldn't even see the veins or anything. It was just a tight, puffed, shiny hand.

Q. Did you go home and do as the doctor suggested?

A. I did that, sir.

Q. Did that help any?

A. It did. It relieved the pain.

Q. Did it remove the pain completely?

A. No, not completely, sir, It was bearable.

82 Q. How long was it before the swelling went down completely?

A. Well, sir, I can't answer that, as you want it.

Q. You just tell us what the fact is

A. From the hand it was, something the size of this, on the top of my hand, that never went away until the operation. I don't know if that was the swelling or not, but the puffiness of the hand, oh, it went down, I guess, before I went back on my next run.

Q. Which was how long?

A. I would say perhaps two days.

Q. In other words, between the 17th and the 19th the general swollen condition of the hand went down?

A. Yes, sir.

Q. But an area about the size you have indicated, which would be about an inch and a half to two inches in diameter, remained raised on the back of your hand?

A. Yes.

Q. For how long did you continue to treat your hand in that way?

A. From the 17th of September—

83 Q. November.

A. November, rather, until April, when the operation was performed.

Q. Did you see Dr. Kitzner in the meantime?

A. Yes. He had me come back occasionally.

Q. How frequently would you see him?

A. At that time I guess that was about a full month period. I would say three to five times I visited Dr. Kitzner.

Q. Was your hand improving?

A. Well, it seemed to, to the extent that the swelling would go and come; but the pain, I still had that, sir; and upon my last visit it was so severe that I suggested leaving him and going to Hines to have my hand taken care of, because the salt crystals wasn't doing any good.

Q. Did you see any other doctor after that?

A. Well, upon telling Dr. Kitzner—

Q. Just yes or no.

A. Yes, sir.

Q. What doctor did you see?

A. One of Dr. Kitzner's associates. I don't know his name.

Q. Did he examine your hand?

84 A. Yes, sir.

Q. Did he prescribe any treatment for your hand?

A. No. He told me to use the crystals and Dr. Kitzner told him he had already had me do that.

Q. After that did he prescribe any other treatment?

A. No other treatment, no.

Q. Did you see any other doctor following that?

A. Yes. He and Dr. Kitzner decided that I would see Dr. Daily.

Q. Do you know Dr. Daily's first name?

A. Yes. Ulysses, I believe it is.

Q. And did you see Dr. Daily?

A. I did see Dr. Daily.

Q. Where did you see him, at his office?

A. It was at his office at the hospital.

Q. What hospital?

A. I believe it was the Provident Hospital, sir.

Q. Did he examine you?

A. Yes, he examined my hand.

Q. Did you tell him how you felt?

A. Yes, sir.

Q. Did you tell him how long you had felt that way?

A. Yes, sir.

85 Q. Did you tell him what had happened to your hand?

A. Yes, sir.

Q. Did he proceed to examine your hand?

A. Yes, sir. He had pictures made of my hand.

Q. I didn't hear you.

A. He had pictures made of my hand.

Q. X-ray pictures, you mean?

A. Yes.

Q. Then what happened?

A. He told me to report to his office the next morning.

Q. Did you?

A. Yes.

Q. Then what happened after that?

A. He said surgery would have to be performed on me, sir.

Q. Did you go to the hospital?

A. I did, sir.

Q. What hospital?

A. The Provident Hospital.

Q. Was surgery performed on you?

A. It was, sir.

Q. Were you asleep when that surgery was per-

86 formed on you?

A. Yes.

Q. When you awoke from that sleep, were there bandages or anything else on your hand?

A. There were bandages.

Q. Where?

A. On my left hand.

Q. How did you feel after the surgery?

A. How did my hand feel or how did I feel?

Q. How did you feel, generally?

A. I felt all right. The hand was sore.

Q. Your hand was sore?

A. Yes.

Q. But you felt all right?

A. Yes.

Q. How long did the bandage remain on your hand?

A. Approximately three months, sir.

Q. How long did you remain in the hospital?

A. I was in the hospital, I believe, three days, sir.

Q. Did Dr. Daily visit you every day?

A. In the hospital—well, not every day, sir, but he would visit me.

Q. How often was the bandage changed on your hand?

87 A. Every day, sir.

Q. In the hospital?

A. In the hospital I believe it was changed once.

Q. After that, do you mean you went to Dr. Daily every day for a month?

A. Every day to his office, yes, sir.

Q. How was your hand?

A. Well, it still was sore. It was stiff.

Q. Feel any better than it did before you had the surgery?

A. Yes, sir, it did.

Q. And for how long a period of time did you continue to see Dr. Daily?

A. Oh, he discharged me August 1st, and I think the last date of the previous month was my last visit to him.

Q. In other words, the last of July?

A. July, sir.

Q. When did you return to work?

A. I returned to work either on the 1st or 2nd, sir.

The Court: Of what?

The Witness: Of August, sir.

By Mr. Wykell:

88 Q. Of August? Now, what was your rate of pay at that time?

A. My rate of pay was $296.40, I believe, sir.

Q. Is that per month?

A. That is per month. That is the salary.

Q. How many hours were you required to work to earn $296.40?

A. They guaranteed you an hourly base of 240 hours per month.

Q. Anything over that is overtime?

A. Anything over that is overtime, sir, yes.

Q. What rate are you paid for overtime? Is it the same rate as the usual rate or higher?

A. I believe it is time and a half. I am not sure, sir.

Q. And in addition to the compensation that you received from the railroad company, did you earn anything as dining car waiter by way of tips?

A. When I was working, you mean?

Q. Yes.

A. Yes, sir.

Q. And what were your average tips?

A. My average tips, sir, would be between $8 and $12 a day, sir.

89 Q. Could you give it to us any closer than th[illegible]?

A. I would say about $11, sir.

The Court: That is for three meals?

The Witness: That is for three meals, yes.

By Mr. Wykell:

Q. Is that for three meals?

A. Yes. On the run that I was on, we only have a dinner and a breakfast to serve.

Q. Some runs have three?

A. Some runs have three.

Q. And do you earn any extra compensation for being pantryman?

A. I believe the pay is $3 a month.

Q. More?

A. More than the regular men's.

Q. Of course, the pantryman puts in a little more time than the others?

A. Yes, sir.

Q. You stated earlier that the pantryman works later than the others?

A. Yes, the pantryman, his time is cut I believe at 10:30 at night, and the rest of the crew is 9:30. He gets an hour more.

90 Q. How does your hand feel at the present time?

A. My hand feels now all right, sir; but it gets sore and has a tendency to swell, sir.

Q. When?

A. Oh, if I use it to a certain extent, sir.

Q. How often does that happen?

A. Well, every trip that I am out on the road, sir.

Q. What do you do for it, anything?

A. Oh, soak it in hot water, put liniment on it.

Q. Does it help?

A. It brings the swelling down and eases the soreness.

Q. Is your hand any different now that it was before the accident in its appearance?

A. In its appearance?

Q. Yes.

A. Yes, it is.

Q. Can you make a fist all right?

A. Yes, sir, I can make a fist. There is a tightness when I do that, sir.

Q. How does your hand differ in appearance from the way it did formerly?

A. Well, it has a long scar and a rising on the
91 back.

Q. Let me see your hand.

Mr. Wykell: Can you all see his hand from where you are seated? May he step down, your Honor, and show it to the jury?

(Witness exhibits hand to the jury.)

The Court: Move along the rail.

Mr. Wykell: Move along the rail, and keep moving back toward the witness chair.

You may inquire.

Cross-Examination by Mr. Keating.

Q. Mr. Milom, prior to this accident, how long a period of time had you had occasion to handle ice on these diners?

A. Well, there are times, sir, that a man is used as a pantryman.

Q. From your own personal experience, how long a period of time prior to the accident had you had occasion to handle ice?

92 A. Ever since I have been with the railroad, sir.

Q. That would be about 13 years?

A. Well, yes, at that time, yes, sir.

Q. This block of ice that you hauled in from the platform weighed approximately 50 pounds?

A. About that, sir.

Q. Mr. Milom, did you look at or inspect the tongs prior to using them on the date of the accident?

A. I looked at the tongs, but I didn't inspect them, sir.

Q. Did you inspect them after the accident?

A. No, sir.

Q. When did you report the accident to the steward, Mr Morrell?

A. Immediately after it happened, sir.

Q. He was there in the dining car at that time?

A. He was in the dining car, yes.

Q. Approximately what time would that be?

A. Oh, I would say maybe 3:30 or 4:00 o'clock, sir.

Q. And your hand hurt you right after the accident, you say; you had a stinging sensation?

93 A. Yes, sir.

Q. This accident took place on November 17, 1954?

A. 16th.

Q. 16th. That is right. Did you continue to work after that date?

A. After that date?

Q. Yes.

A. Yes, sir.

Q. For how long a period of time did you work?

A. Oh, until Dr. Daily operated.

Q. When was that operation performed?

A. I believe it was the 4th day of April, 1955.

Q. The next year?

A. Yes, sir.

Q. So you worked approximately five months before the operation was performed, is that correct?

A. Yes, sir.

Q. And you went back to work on approximately August 1st of 1955?

A. Yes, sir.

Q. So you lost approximately four months from service as a result of this operation?

A. Approximately.

Q. Did you make a complaint to anyone associ-

94 ated with the railroad ever, either on the day of the accident or before, concerning a condition of ice tongs?

Mr. Wykell: Object, if the Court please.

The Court: He may answer.

By Mr. Keating:

Q. Did you ever make such a complaint, Mr. Milom?

A. Concerning the ice tongs being dull?

Q. Yes.

A. No, sir.

Q. You made no such complaint—is that what you said?

A. No, sir.

Q. Mr. Milom, I believe you testified that your monthly scale was $296, something like that?

Mr. Wykell: And 46 cents.

By the Witness:

A. I believe that is right.

By Mr. Keating:

Q. Some months would you earn more or less than that amount from your work, not counting your tips?

A. No, sir.

Q. Could you earn less, or did you ever earn 95 less?

A. Yes. If I didn't make a run, I wouldn't get paid for that.

Q. So that that amount, $296.46, was not necessarily your monthly compensation then, was it?

A. At that particular time it was, sir.

Q. You might receive less than that if you didn't work that much, isn't that right?

A. Just as of now, sir.

Q. What was your average monthly earnings then?

A. $296.46.

Q. Well, if you earned less than $296.46 in some months, and not more than $296.46 in some months, how could the average amount be $296.46?

A. Maybe I don't understand you.

Q. I don't want to confuse you, Mr. Milom. I just

want to know if you have any idea what your average monthly earnings were at the time of the accident—not what your rate of pay was provided you worked a certain amount, but what were your average monthly earnings? Do you have any idea?

A. No, I don't sir.

Q. Did you file an income tax return for the year

96 1955?

A. Yes, I did.

Q. And you reported your tips, did you on that income tax return?

Mr. Wykell: Objected to, if the Court please.

Mr. Keating: His earnings are in issue here.

Mr. Wykell: But not his income tax return. If the Court please, if they wanted that, they could have subpoenaed it.

The Court: Yes, I think that is correct.

By Mr. Keating:

Q. Mr. Milom, do you recall giving a statement to a representative of the New York Central Claim Department on approximately April 25, 1955, concerning this accident, in Chicago?

A. Yes.

Q. And do you recall making the statement that your average tips were $8 a day?

A. Yes, I did.

Q. At that time, Mr. Milom, you were assigned to the Wolverine, is that correct?

97 A. Yes.

Q. Was that between Chicago and New York?

A. Yes.

Q. What time did the train leave Chicago?

A. I believe it is 1:55, I believe.

Q. When would you get to New York?

A. About 9:15 the next morning, sir.

Q. Then would you usually leave from New York that same afternoon to return to Chicago?

A. Yes, sir.

Q. How many days a month would you so do that, average?

A. Well, if we got out on the 1st day of the month, sir, I believe we got in three complete trips for the half, which would be about six trips a month.

Q. By complete trip you mean Chicago to New York and return?

A. Yes.

Q. So you would make approximately six of those a month?

A. Yes, sir.

Q. So that would be an average of about 12 days a month on the road?

98 A. About that, sir. Pardon me, sir. Did you say 12 days a month on the road?

Q. Yes, you said you made six trips a month.

A. All right, sir. Well, it is about three days per trip, sir.

Q. Well, if you leave Chicago in the afternoon, and arrive in New York the next morning, and leave New York that evening and get back to Chicago the next morning—

A. That would be about three days.

Q. That would be two nights, but it would go into three days, is that correct?

A. Right, sir.

Q. And you would make about six of those trips a month?

A. Right, six trips a month.

Q. Six round trips?

A. Right, sir.

Mr. Keating: That is all I have, your Honor.

Redirect Examination by Mr. Wykell.

Q. On each trip you served two meals out and two
99 meals back, is that right?

A. That is right.

Q. So that would be four meals per trip?

A. Per trip.

Mr. Wykell: That is all.

(Witness excused.)

* * * * *

111 December 6, 1956,
10:00 o'clock A. M.

Trial resumed pursuant to adjournment.

Present:

Mr. Leo K. Wykell on behalf of the plaintiff;

Mr. Martin J. Keating on behalf of the defendant.

* * * * *

114 CLYDE A. MORRELL, called as a witness on the part of the defendant, being first duly sworn, testified as follows:

The Court: What is your name, sir?

The Witness: Clyde A. Morrell.

The Court: Where do you live?

The Witness: 5431 South Indiana.

The Court: Where are you employed?

The Witness: New York Central, dining car department.

The Court: You are the steward.

The Witness: Dining car steward.

The Court: How long have you been there?

The Witness: 16 years.

The Court: How long?

The Witness: 16 years.

The Court: You know the plaintiff in this case, don't you?

The Witness: I do.

The Court: He was one of the waiters?

The Witness: He was.

The Court: Proceed.

115 By Mr. Keating:

Q. Mr. Morrell, you worked on the Wolverine on November 16, 1954?

A. I was.

Q. What time did you report to work on that day?

A. 3:00 o'clock, that is my regular time.

Q. You were steward on that car?

A. Dining steward.

Q. Did anything unusual happen that afternoon before you left New York City?

A. Anything unusual? It did.

Q. Tell us.

A. Milom was handling the ice, and he came over and told me he hurt his hand handling the ice. He reported it to me.

Q. You would be in charge of Mr. Milom at that time, I take it?

A. That is right.

Q. Did he tell you how the accident happened?

A. He said handling the ice.

Q. Did he make any complaint about the ice tongs?

A. No, just handling the ice.

Q. Did you witness the accident?

116 A. No.

Q. Do you know of any witnesses to the accident?

A. No.

Q. Now, are ice tongs regularly assigned to these cars for handling ice?

A. Surely.

Q. Are those tongs sometimes replaced?

A. Oh, yes. That is part of the standard equipment.

Q. Are you familiar with the practice, if there is such a one, of the replacing of ice tongs?

A. I am.

Q. State what that practice is.

A. The equipment in the pantry is usually ordered and handled by the pantryman.

Q. Who would the pantryman order that equipment from?

A. Our commissary.

Q. Where is the commissary located?

A. On this particular run, we have a commissary in Chicago, and one in New York, at the Mount Haven Yards.

Mr. Keating: You may inquire.

117 *Cross-Examination by Mr. Wykell.*

Q. Henderson Milom was not the regular pantryman on this run, was he?

A. No, he was relief man.

Q. And he did not know he was going to be the pantryman until he reported for duty in Chicago before the Wolverine went out, is that correct?

A. That is correct.

Q. Now, the New York Central System does not inspect these ice tongs, do they?

A. No, they have no system of inspection of tongs.

Q. And they have no system whereby the ice tongs are sharpened periodically, do they?

A. No.

Q. And the first time the party acting as a pantryman sees those tongs is when he gets on the train and proceeds to use them, is that correct?

A. Yes, sir.

Q. The pantryman reports earlier than other waiters, is that right?

A. Most of the time his reporting time is about the same as mine, so he would be there at 3:00 o'clock. The rest of the crew would report at 4:00.

118 Q. You say he is there earlier?

A. Earlier.

Q. And the reason he is there earlier is because he has additional duties to perform?

A. That is correct.

Q. And the additional duties I assume keep the man busy for the hour that he is there?

A. That is right.

Q. You are familiar with the ice tongs that are used by the New York Central Railroad?

A. I am.

Q. I will ask you to look at Plaintiff's Exhibit 1 in evidence. Do these look like a set of New York Central ice tongs?

A. Yes.

Q. Would you say that is representative of the tongs that are used on the road?

A. That is a fair tong.

Q. You would say that is representative?

A. Yes.

Q. It looks like the average set of tongs you find in every pantry on the New York Central?

A. That is right.

119 Q. Now, Mr. Morrell, do you remember positively that Milom said nothing to you about the tongs on that occasion?

A. I am sure he did not.

Q. You are sure he did not?

A. He said he hurt his hand handling the ice, and I just assumed it was with a pair of tongs.

Q. You assumed it?

A. I assumed it was with a pair of tongs.

Mr. Wykell: That is all.

(Witness excused.)

Mr. Keating: The defendant rests.

Mr. Wykell: It may be stipulated by counsel that the age of the plaintiff is 34 years. Is that correct?

Mr. Keating: Yes, that is correct.

The Court: Both sides rest?

Mr. Keating: Both sides rest.

* * * * *

18 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—55-C-1276) * *

Now comes the defendant, New York Central Railroad Company, a corporation, by Marvin A. Jersild and Martin J. Keating, its attorneys, at the close of all the testimony offered on behalf of plaintiff, and moves the Court to instruct the jury to find the defendant not guilty for the following reasons:

(a) The evidence fails to show that the defendant was guilty of any one or more of the negligent acts or omissions charged by plaintiff in his complaint;

(b) The evidence affirmatively shows that the defendant was not guilty of any one or more of the negligent acts or omissions charged by plaintiff in his complaint;

and with this motion tenders to the Court, separately and distinctly from any other instructions tendered in the case, a written instruction in the following form:

"The Court instructs the jury to find the defendant not guilty," with the request that the Court mark that instruction "given" and read the same to the jury.

Marvin A. Jersild,
Martin J. Keating,
Attorneys for Defendant.

19 The court instructs the jury to find the defendant not guilty.

20 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—55-C-1276) * *

And now comes the defendant, New York Central Railroad Company, a corporation, by Marvin A. Jersild and Wayne M. Hoffman, its attorneys, by Martin J. Keating, after the close of all testimony offered on behalf of plaintiff, and moves the court to exclude from the consideration of the jury all the evidence offered in the above entitled cause on the part of the plaintiff against said defendant as to paragraph 3 of plaintiff's complaint, and to give to the jury the following instruction, to-wit:

"The court instructs the jury to find the defendant not guilty as to paragraph 3 of plaintiff's complaint."

And with this motion it tenders to the court a written instruction in the form aforesaid, separate and distinct from any other instruction asked in the case to be by the court marked "Given" and read to the jury.

.....

.....

Attorneys for Defendant.

By .....

21 The court instructs the jury to find the defendant not guilty as to paragraph 3 of plaintiff's complaint.

22 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—55-C-1276) * *

And now comes the defendant, New York Central Railroad Company, a corporation, by Marvin A. Jersild and Wayne M. Hoffman, its attorneys, by Martin J. Keating, after the close of all testimony offered on behalf of plaintiff, and moves the court to exclude from the consideration of the jury all the evidence offered in the above-entitled cause on the part of the plaintiff against said defendant as to paragraph 3(a) of plaintiff's complaint, and to give to the jury the following instruction, to-wit:

> "The court instructs the jury to find the defendant not guilty as to paragraph 3(a) of plaintiff's complaint."

And with this motion it tenders to the court a written instruction in the form aforesaid, separate and distinct from any other instruction asked in the case to be by the court marked "Given" and read to the jury.

.....

.....

Attorneys for Defendant.

By.....

23 The court instructs the jury to find the defendant not guilty as to paragraph 3(a) of plaintiff's complaint.

24 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—55-C-1276) * *

And now comes the defendant, New York Central Railroad Company, a corporation, by Marvin A. Jersild and Wayne M. Hoffman, its attorneys, by Martin J. Keating, after the close of all testimony offered on behalf of plaintiff, and moves the court to exclude from the consideration of the jury all the evidence offered in the above-entitled cause on the part of the plaintiff against said defendant as to paragraph 3(d) of plaintiff's complaint, and to give to the jury the following instruction, to-wit:

> "The court instructs the jury to find the defendant not guilty as to paragraph 3(d) of plaintiff's complaint."

And with this motion it tenders to the court a written instruction in the form aforesaid, separate and distinct from any other instruction asked in the case to be by the court marked "Given" and read to the jury.

.....

.....

Attorneys for Defendant.

By.....

25 The court instructs the jury to find the defendant not guilty as to paragraph 3(d) of plaintiff's complaint.

26 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—55-C-1276) * * *

Now comes the defendant, New York Central Railroad Company, a corporation, by Marvin A. Jersild and Martin J. Keating, its attorneys, at the close of all testimony offered on behalf of both parties, and moves the Court to instruct the jury to find the defendant not guilty for the following reasons:

(a) The evidence fails to show that the defendant was guilty of any one or more of the negligent acts or omissions charged by plaintiff in his complaint;

(b) The evidence affirmatively shows that the defendant was not guilty of any one or more of the negligent acts or omissions charged by plaintiff in his complaint;

and with this motion tenders to the Court, separately and distinctly from any other instructions tendered in the case, a written instruction in the following form:

"The Court instructs the jury to find the defendant not guilty," with the request that the Court mark that instruction "given" and read the same to the jury.

Marvin A. Jersild,
Martin J. Keating,
Attorneys for Defendant.

27 The court instructs the jury to find the defendant not guilty.

28 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—55-C-1276) * *

And now comes the defendant, New York Central Railroad Company, a corporation, by Marvin A. Jersild and Wayne M. Hoffman, its attorneys, by Martin J. Keating after the close of all testimony offered on behalf of both parties and before the arguments of counsel are commenced, and moves the court to exclude from the consideration of the jury all the evidence offered in the above-entitled cause on the part of the plaintiff against said defendant as to paragraph 3 of plaintiff's complaint, and to give to the jury the following instruction, to-wit:

"The court instructs the jury to find the defendant not guilty as to paragraph 3 of plaintiff's complaint."

And with this motion it tenders to the court a written instruction in the form aforesaid, separate and distinct from any other instruction asked in the case to be by the court marked "Given" and read to the jury.

.....

.....

* *Attorneys for Defendant,*

By .....

29 The court instructs the jury to find the defendant not guilty as to paragraph 3 of plaintiff's complaint.

30 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—55-C-1276) * *

And now comes the defendant, New York Central Railroad Company, a corporation, by Marvin A. Jersild and Wayne M. Hoffman, its attorneys, by Martin J. Keating after the close of all testimony offered on behalf of both parties and before the arguments of counsel are commenced, and moves the court to exclude from the consideration of the jury all the evidence offered in the above entitled cause on the part of the plaintiff against said defendant as to paragraph 3(a) of plaintiff's complaint, and to give to the jury the following instruction, to-wit:

> "The court instructs the jury to find the defendant not guilty as to paragraph 3(a) of plaintiff's complaint."

And with this motion it tenders to the court a written instruction in the form aforesaid, separate and distinct from any other instruction asked in the case to be by the court marked "Given" and read to the jury.

Attorneys for Defendant.

31 The court instructs the jury to find the defendant not guilty as to paragraph 3(a) of plaintiff's complaint.

32 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—55-C-1276) * *

And now comes the defendant, New York Central Railroad Company, a corporation, by Marvin A. Jersild and Wayne M. Hoffman, its attorneys, by Martin J. Keating after the close of all testimony offered on behalf of both parties and before the arguments of counsel are commenced, and moves the court to exclude from the consideration of the jury all the evidence offered in the above-entitled cause on the part of the plaintiff against said defendant as to paragraph 3(d) of plaintiff's complaint, and to give to the jury the following instruction, to-wit:

> "The court instructs the jury to find the defendant not guilty as to paragraph 3(d) of plaintiff's complaint."

And with this motion it tenders to the court a written instruction in the form aforesaid, separate and distinct from any other instruction asked in the case to be by the court marked "Given" and read to the jury.

.....

.....

Attorneys for Defendant.

By .....

33 The court instructs the jury to find the defendant not guilty as to paragraph 3(d) of plaintiff's complaint.

37 IN THE UNITED STATES DISTRICT COURT.
• • (Caption—55-C-1276) • •

MOTION BY DEFENDANT FOR JUDGMENT NOTWITHSTANDING THE VERDICT, OR IN THE ALTERNATIVE, A NEW TRIAL.

Now comes the Defendant, New York Central Railroad Company, and moves the court to set aside the verdict entered in the above entitled action on December 7, 1956, and the judgment entered thereon on December 7, 1956, and to enter judgment in favor of the defendant in accordance with the motion for a directed verdict made by the defendant at the close of the testimony offered on behalf of the plaintiff, and renewed at the close of all the testimony, on the grounds, as stated in that motion that:

1. The evidence fails to show that the defendant was guilty of any one or more of the negligent acts or omissions charged by plaintiff in his complaint.

2. The evidence affirmatively shows that the defendant was not guilty of any one or more of the negligent acts or omissions charged by plaintiff in his complaint.

38 3. The evidence does not warrant a finding that there was any defect in the ice tongs owned by the defendant at the time and place of the accident.

In the alternative, defendant moves the court to set aside the verdict and judgment entered thereon and grant defendant a new trial on the following grounds:

1. The evidence fails to show that the defendant was guilty of any one or more of the negligent acts or omissions charged by plaintiff in his complaint.

2. The evidence affirmatively shows that the defendant was not guilty of any one or more of the negligent acts or omissions charged by plaintiff in his complaint.

3. The evidence does not warrant a finding that there was any defect in the ice tongs owned by the defendant at the time and place of the accident.

Marvin A. Jersild,
Martin J. Keating,
Attorneys for the Defendant,
1236 LaSalle Street Station,
WAbash 2-4200

I hereby certify that I have, this date, personally served upon the attorneys for the plaintiff, Epstein & Wilsey, 100 North LaSalle Street, Chicago, Illinois, a copy of the foregoing motion.

VERDICT.

(Filed December 7, 1956.)

35 We, the jury, find the defendant guilty and assess the plaintiff damages ir the sum of $7,500.00.

JUDGMENT.

36 Enter judgment on the verdict for the plaintiff against the defendant for $7,500.00.

Motion for new trial set for hearing on December 28, 1956.

And afterwards, to wit, on January 8, 1957, the following further proceedings were had in the above entitled cause, to wit:

ORDER.

The defendant's motion for judgment notwithstanding the verdict or in the alternative for a new trial is overruled.

And afterwards, to wit, on the 7th day of February, 1957, the following proceedings were had in the above entitled cause, to wit:

Comes now the defendant herein, and files a Notice of Appeal to the United States Court of Appeals for the Seventh Circuit (copy of which is mailed to Epstein & Wilfley and Wykell, attorneys, on this date,) and reads in the words and figures following, to wit:

40 IN THE UNITED STATES DISTRICT COURT.
Northern District of Illinois,
Eastern Division.

Henderson Milom,
Plaintiff.
vs.
New York Central Railroad Company, a corporation,
Defendant.
No. 55 C 1276

NOTICE OF APPEAL.

(Filed Feb. 7, 1957. Roy. H. Johnson, Clerk.)

Notice is hereby given that New York Central Railroad Company, defendant above named, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the order entered on January 8, 1957, by the District Court denying the motion of the defendant for a judgment notwithstanding the verdict, or in the alternative, for a new trial, said motions made pursuant to a judgment entered in favor of the plaintiff on December 7, 1956.

The names of the plaintiff and his attorneys of record are:

Henderson Milom, plaintiff.

Epstein & Wilsey and Leo Wykell, as attorneys.

The names of the party defendant and its attorneys of record are:

New York Central Railroad Company, defendant, and Marvin A. Jersild and Martin J. Keating, its attorneys.

Marvin A. Jersild,
Martin J. Keating,
Attorneys for Defendant,
1236 LaSalle Station,
WAbash 2-4200.

41 United States of America, }
Northern District of Illinois, } ss:

CERTIFICATE OF MAILING.

I, Roy H. Johnson, Clerk of the United States District Court in and for the Northern District of Illinois do hereby certify that on February 7, 1957, in accordance with Rule 73(b) of the Federal Rules of Civil Procedure a copy of the foregoing Notice of Appeal was mailed to Epstein & Wilsey and Leo Wykell, Attorneys for the plaintiff, 100 No. LaSalle Street, Chicago, Illinois.

In Testimony Whereof I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this day of February, 1957.

Roy H. Johnson,
Clerk,

(Seal)

Gizella Butcher,
Deputy Clerk.

149 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—55-C-1276) * *

STIPULATION FOR TRANSMISSION OF RECORD ON APPEAL UNDER RULE 12E OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

It is stipulated by and between the appellant and appellee hereto, by their respective counsel, that the Clerk of the District Court shall transmit to the Clerk of the United States Court of Appeals for the Seventh Circuit the following original papers, which papers shall constitute the record on appeal:

1. Complaint filed August 26, 1955.
2. Answer filed September 19, 1955.
3. Amended Complaint filed April 10, 1956.
4. Answer to Amended Complaint filed April 18, 1956.
5. Order amending Complaint on its face entered December 4, 1956.
6. Order calling case for trial and showing impanelling of jury entered December 4, 1956.
7. Separate Motions of the defendant for directed verdict made at the close of the plaintiff's evidence filed December 7, 1956.
8. Separate Motions of the defendant for directed verdict made at the close of all evidence filed December 7, 1956.

150 9. Order reserving ruling on defendant's motions for directed verdict, entered December 7, 1956.

10. Verdict returned on December 7, 1956, assessing plaintiff's damages at $7,500.

11. Judgment on the verdict entered December 7, 1956.

12. Motion for judgment notwithstanding the verdict

and in the alternative for a new trial filed December 17, 1956.

13. Order denying defendant's motion for judgment notwithstanding the verdict and for a new trial entered January 8, 1957.

14. Notice of Appeal filed February 7, 1957.

15. Order approving supersedeas bond of the defendant in the amount of $9,000 entered February 15, 1957.

16. The entire transcript of proceedings beginning December 4, 1956, with the commencement of the trial, and concluding December 7, 1956, with the arguments of counsel.

17. Such other matters as may be required to be certified.

Marvin A. Jersild,
Martin J. Keating,
Attorneys for Defendant-Appellant,
1236 LaSalle Station,
WAbash 2-4200.

Leo K. Wyker
Attorney for Plaintiff-Appellee,
Suite 1540,
10 South LaSalle Street,
Chicago 3, Illinois.

Office - Supreme Court, U.S.
FILED
DEC 3 3 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 688

HENDERSON MILOM,

Petitioner,

vs.

NEW YORK CENTRAL RAILROAD COMPANY,
a Corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

E. M. BURKE
10 S. LaSalle Street
Chicago, Illinois
Attorney for Petitioner.

LEO K. WYKELL
10 S. LaSalle Street
Chicago 3, Illinois
Of Counsel.

The Scheffer Press Inc.—ANdover 3-6850

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957.

No.

HENDERSON MILOM,

Petitioner,

vs.

NEW YORK CENTRAL RAILROAD COMPANY,
a Corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Henderson Milom, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled case on September 27, 1957.

JUDGMENT AND OPINION OF THE COURTS BELOW

The Judgment of the United States District Court for the Northern District of Illinois, Eastern Division was entered on December 7, 1956. It is not reported but is part of the record filed with the clerk of the Court of Appeals below (R. 36).

The opinion of the United States Court of Appeals for the Seventh Circuit reversing said judgment and ordering a dismissal of the action was filed September 27, 1957 and is reported as 248 Fed. 2d 52. (App. A).

JURISDICTION.

The Judgment to be reviewed was entered on September 27, 1957, (App. B).

Jurisdiction of this Court is invoked under 28 U. S. Code, Section 1254 (1), (App. C).

QUESTIONS PRESENTED FOR REVIEW.

QUESTION I.

Whether evidence from which an inference may be drawn is sufficient to support a charge of negligence in a "Federal Employers' Liability" case?

QUESTION II.

Does a Court of Appeals invade the province of the jury and the Trial Court by reversing a verdict and judgment for an employee and directing entry of a final judgment for the railroad employer where the record shows that:

> The employee was injured through the use of an undersized, dull ice tongs which failed to hold a block of ice; the tongs being supplied by the railroad, who neither inspects nor sharpens them?

STATUTES INVOLVED.

28 U. S. Code, Sec. 1254 (1), Appendix C.
45 U. S. Code, Sec. 51, Appendix D.
45 U. S. Code, Sec. 56, Appendix E.

STATEMENT OF THE CASE.

This action was brought by Henderson Milom, Petitioner, a dining car waiter in the employ of the Respondent for injuries received on November 16, 1954 as a result of the alleged negligence of the employer. (R. 9-13)

On this date the Petitioner was acting as a pantry man. This entailed working longer hours than a waiter (R. 117-118) and additional duties. One of these duties was to ice up vegetables, fruits, fruit juices and butter. To accomplish this he brought a fifty (50) pound block of ice into the pantry by dragging it to the pantry from the platform, a distance of about twenty (20) to twenty-two (22) feet (R. 72) and then he regripped the ice with the tongs. He then attempted to lift the block of ice to a ledge about four (4) feet above the floor. (R. 74) When the ice was near the top of the ledge the tongs slipped. (R. 74) He tried to balance himself with one hand and held on to the tongs with the other. The tongs regripped in the ice before the ice struck the floor and jerked or snapped his wrist. (R. 74-75)

The ice tongs are supplied by the employer as part of the pantry equipment. (R. 69) The first time the pantryman sees them is when he uses them. (R. 117) As far as this record is concerned this was the first occasion the Petitioner had to use these particular tongs. (R. 69)

A pair of ice tongs (Pl. X-1) was introduced into evidence. The witness Edward Clements testified they looked exactly like the tongs used on November 16, 1954 as nearly as he could say. (R. 54-55) The Petitioner testified they were *exactly* like the ones used on the occasion in question except for a little more or less paint or rust. (R. 77)

The employer, New York Central Railroad Company, had no system for inspecting ice tongs (R. 69, R. 117) and no periodic sharpenings. (R. 117)

This action was brought under the Federal Employers' Liability Act and the Jurisdiction of the District Court was invoked under the provisions of 45 U. S. Code, Section 56.

REASONS FOR GRANTING THE WRIT.

The concurring opinion of the Chief Judge of the Seventh Circuit invites review by this august Court. The last sentence of the first paragraph in his opinion states, "However, I have considerable doubt that our decision will be upheld." The concluding sentence of this opinion says, "However, I shall await with great interest further pronouncements by the Supreme Court."

It is apparent that the learned Judge knows the teachings of the Supreme Court and it is just as clear that he will not follow these decisions without further directions. Without such directions the Court of the Seventh Circuit will continue to decide these cases as though they were ordinary negligence cases.

The crystal clarity of the recent pronouncements of the Supreme Court fail to guide the Court of Appeals. Perhaps iteration will have greater impact than rhetoric.

The present decision complained of is in direct conflict with a line of recent cases commencing with *Rogers* v. *Missouri Pacific Railroad Co.* 352 U.S. 503, 77 S. Ct. 443 and the latest being *Stinson* v. *Atlantic Coast Line R. Co.* 78 S. Ct. 136. It is heartening to those who believe that legal decisions should bear a relationship to reality to find pronouncements wiping away the legal fiction that three reviewing Judges can better determine what the facts are

from the cold record than can twelve intelligent jurors and an experienced, able, trial Judge.

In this case the Court of Appeals places much emphasis upon the fact that no one testified that the tongs were dull or otherwise defective. Oh, the magic of the word! It is not enough that the triers of the facts should see a set of tongs that conformed exactly in physical shape and outline to the ones used on the occasion in question (R-77) and determine whether the tongs are sharp or dull through their own senses. In the concept of the reviewing Court some witness must say the tongs are dull. It is this magic incantation which shall visit the economic consequences upon the railroad. If a photograph of the original tongs were in evidence and the jury saw that, would the photograph describe more than the shape, outline and configuration of the tongs? What magic words would the Court require in that event?

In order to satisfy the requirement that the Federal Employers' Liability Act be uniformly administered, it is necessary to reverse the judgment of the Court below.

CONCLUSION.

For the foregoing reasons it is respectfully urged that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

E. M. BURKE,
Attorney for Petitioner.

LEO K. WYKELL,
Of Counsel.

APPENDIX A.

In The

UNITED STATES COURT OF APPEALS

For The Seventh Circuit

No. 11996 September Term, 1957 September Session, 1957.

Henderson Milom,
Plaintiff-Appellee,
v.
New York Central Railroad Company, a corporation,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

September 27, 1957

Before DUFFY, *Chief Judge*, and FINNEGAN and SCHNACKENBERG, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* This action, arising under the Federal Employers' Liability Act, 45 U.S.C.A. § 51, et seq., was brought by plaintiff, a dining car waiter in the employ of defendant, to recover for alleged injuries sustained during the course of his employment. The jury returned a verdict for $7,500 in plaintiff's favor upon which the court entered judgment and this appeal followed. Defendant seeks a reversal. The errors relied on arise out of the action of the district court in overruling defendant's motions for a directed verdict and for judgment notwithstanding the verdict.

1. Defendant's motion for a directed verdict at the close of plaintiff's evidence.

In considering the district court's failure to sustain this motion, we are required to review the evidence then before the court. That evidence, construed in a light most favorable to plaintiff, tended to prove the following facts:

On November 16, 1954, plaintiff, as a dining car pantryman on one of defendant's dining cars, in the performance of his duties, dragged a 50 lb. cake of ice from the back platform of the car into the pantry with one of the sets of ice tongs provided by defendant. After dragging the ice into the pantry he picked it up with the tongs. When he had lifted the ice about three feet toward a ledge, the ice slipped in the tongs. Plaintiff held onto the tongs with his left hand the the tongs regripped in the ice before it hit the floor, thereby jerking or snapping his wrist. After this occurrence plaintiff succeeded in lifting the ice.

For some four and one-half months thereafter plaintiff continued to work for defendant in his usual occupation. On April 4, 1955, an operation was performed on plaintiff's hand. He remained in the hospital for three days. As a result plaintiff did not work until August 1, 1955.

Plaintiff had handled ice for defendant for a period of thirteen years prior to the accident. He had looked at the ice tongs prior to the accident but did not inspect them. He did not make a complaint to anyone associated with defendant, on, before, or after the day of the accident concerning the condition of the ice tongs. No witness testified that the ice tongs were dull, or otherwise defective. In examining plaintiff, his counsel did not ask him whether the tongs were sharp or dull.

Plaintiff offered in evidence a set of ice tongs after it was testified that they conformed exactly in physical shape and outline to the tongs used by plaintiff at the time of the accident. It was agreed that this exhibit was not the set used by plaintiff on the occasion in question. Plaintiff's attorney stated that "they were merely shown to

show the outline and configuration"; whereupon defendant withdrew an objection to their admission and they were received in evidence.

The need for some proof as to the sharpness of the blades on the tongs which plaintiff used was tacitly recognized by his counsel who made an abortive attempt to introduce such evidence. Plaintiff's witness, Edward Clements, who was present when the accident occurred, was asked by plaintiff's counsel—in referring to the tongs in evidence and the tongs used by plaintiff when he was injured—"was the degree of the sharpness of the blades about the same?" The court sustained defendant's objection to the question and it was not answered. No question is raised before us, or could successfully be raised, as to the correctness of this ruling, in view of the requirements of the law of evidence.

The only charge of negligence in plaintiff's amended complaint, upon which he relies in this appeal, is that "defendant negligently, carelessly and improperly caused or permitted the following acts of negligence: (a) maintained and provided the plaintiff with defective ice tongs: * * *"

Defendant's motion raised the question of whether plaintiff, in presenting his case, had introduced any evidence to support this charge.

There was no evidence that the tongs which plaintiff used were sharp or dull. Plaintiff testified that he looked at the tongs prior to using them on the date of the accident, and that neither then nor after the accident did he inspect them. Plaintiff further testified that at no time did he make a complaint to anyone associated with the railroad concerning the condition of the ice tongs. There was no other reference in the evidence to the condition of the tongs.

The conclusion is inescapable that there was no evidence of even the slightest probative force that the tongs were defective, as charged by plaintiff. This absence of

proof is fatal to plaintiff's case. There must be evidence of negligence on the part of defendant before the case may properly be submitted to the jury. In *Rogers* v. *Missouri Pacific R. Co.*, 352 U.S. 500, 506, the court said:

> "*Under this statute the test of a jury case is simply* whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. * * * Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. * * * The statute expressly imposes liability upon the employer to pay damages for injury or death due 'in whole or *in part*' to its negligence."

And, at 508, the court said:

> "* * * for practical purposes the inquiry in these cases today rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit. * * *"

These statements recognize that, to support an employee's action for damages, there must be proof of employer negligence and proof that it played some part, even the slightest, in producing the injury for which damages are sought. In the case at bar we find no proof of employer's alleged negligence and hence there cannot arise any question of whether the negligence charge played any part in producing plaintiff's injuries.

In *C. & O. Ry. Co.* v. *Stapleton*, 279 U.S. 587, 589, the court said:

> "The language of the Federal Employers' Liability Act shows unmistakably that the basis of recovery is negligence and that without such negligence no right of action is given under this Act."

In the absence of proof of employer's negligence we cannot speculate as to the cause of injury to plaintiff. The burden of proof as to plaintiff's charge of negligence on the part of defendant rested upon plaintiff. This burden he failed to sustain.

The mere occurrence of an injury to plaintiff while employed by a railroad does not make the employer liable. The Act imposes liability only for negligent injuries. *Wilkerson* v. *McCarthy*, 336 U.S. 53, 61. The United States Supreme Court has disclaimed any intention to make "for all practical purposes, a railroad an insurer of its employees." *Ibid.*, 62.

Seeking to justify the district court's failure to sustain defendant's motion for a directed verdict at the close of plaintiff's evidence, plaintiff's counsel now argues that defendant had not produced the tongs used by plaintiff and did not explain their absence, and, therefore, an inference may be drawn that "the tongs in the putative possession of the defendant would have displayed a degree of dullness equal to or exceeding" the tongs in evidence. He overlooks the fact that, at that stage of the trial, no occasion had arisen for defendant to produce any evidence and that therefore at that time no inference whatsoever could be drawn from defendant's failure to produce any evidence to meet plaintiff's claim. The burden of proof of defendant's alleged negligence was upon plaintiff and the motion for a directed verdict at the close of plaintiff's evidence should have been decided in view of the evidence then in the record. The court's failure to sustain that motion cannot be aided by any inference based upon defendant's failure to produce the tongs used by plaintiff at the time of the accident, even if it had appeared that they were in the possession of defendant and were capable of identification by it.

Moreover, plaintiff made no effort to introduce these tongs as a part of his case. It does not appear that plaintiff made any attempt under the Federal Rules of Civil Procedure, 28 U.S.C.A., rules 26 through 30, 34, 37 and

45(b), to procure or require production in court of the tongs involved in the accident in question, or to examine on deposition any agents or employees of the defendant for the purpose of obtaining information in connection therewith.

Plaintiff being unaided by any inference that defendant had the tongs and could identify them in order to produce them in court, and the record being devoid of any evidence that the tongs in question were dull or otherwise defective in their condition, it was the duty of the district court to instruct the jury to find in favor of defendant at the close of plaintiff's evidence, and, in failing to do so, the court committed reversible error.

2. Defendant's motion for a directed verdict at the close of all the evidence.

What we have already said indicates that a reversal of the judgment is required. Although it is not necessary, we refer also to the failure of the district court to sustain defendant's motion for a directed verdict at the close of all the evidence. What we have said in regard to the motion made at the close of plaintiff's case applies as well to the motion made at the close of all the evidence. In addition thereto, no inference in regard to whether the tongs used by plaintiff were sharp or dull could be justifiably drawn against defendant because the uncontradicted testimony shows that it could not have produced those tongs if it had wished to do so. According to the evidence, it was the practice of defendant's commissary to replace tongs on order of the pantryman. Further, an inspection of the representative tongs in evidence reveals that they bear no number or other distinguishing mark so as to enable one to identify any particular tongs. The record shows that all pantryman's tongs look alike. Therefore, even if defendant desired to produce the tongs which plaintiff used, it would have been impossible to identify them. Moreover, no occasion arose for an effort by defendant to locate those tongs during a period of five months after plaintiff's injury because during that time he never com-

plained concerning their condition. For these reasons we hold that no inference unfavorable to defendant can be legitimately drawn because of its inability to produce the tongs used by plaintiff.

We therefore conclude that it was reversible error for the district court not to sustain defendant's motion for a directed verdict at the close of all the evidence.

3. Defendant's motion for judgment notwithstanding the verdict.

For the same reasons as those above expressed, we find that it was reversible error not to sustain defendant's motion for judgment notwithstanding the verdict.

Accordingly the judgment from which this appeal was taken is reversed and this cause is remanded to the district court with directions to enter a judgment dismissing the action on the merits.

Reversed and Remanded With Directions.

FINNEGAN, *C.J.* concurs in result.

DUFFY, *Chief Judge*, concurring.

I think we are deciding this case correctly for the reason that there is not even a scintilla of evidence to support the charge of negligence by the defendant. However, I have considerable doubt that our decision will be upheld.

Judge Schnackenberg has pointed out that in a case decided in 1948, the Supreme Court disclaimed any intention to make "for all practical purposes, a railroad an insurer of its employees." That charge had been made by Judge Major, a great Chief Judge of this Court. *Griswold v. Gardner*, 7 Cir., 155 F. 2d 333, 334.

In my opinion there was considerable basis for Judge Major's conclusion. In his dissenting opinion in *Bailey v. Central Vermont Railway, Inc.*, 319 U.S. 350, 358, Mr. Justice Roberts was apparently of that view. He said: "Finally, I cannot concur in the intimation, *which I think*

the opinion gives, (emphasis supplied) that, as Congress has seen fit not to enact a workmen's compensation law, this court will strain the law of negligence to accord compensation where the employer is without fault."

In any event, there has been a substantial change in the personnel of the Supreme Court since 1948. Recent cases of that Court set forth in my opinion in *Gibson* v. *Elgin, Joliet & Eastern Ry.*, ... F. 2d ....., on rehearing, have just about convinced me that in any case where a trial judge submits a case to the jury under the F.E.L. Act, and the jury returns a verdict for the plaintiff, the defendant may as well pay up, irrespective of the proof on the question of negligence and causation. I am also being driven to this extreme position by the statement in the opinion of Mr. Justice Brennan in *Rogers* v. *Missouri Pacific Railroad Company*, 1956, 352 U.S. 500, 508: "The burden of the employee is met, and the obligation of the employer to pay damages arises, when there is proof, even though entirely circumstantial, from which the jury may with reason make that inference." To further emphasize the view of a majority of the Court, Mr. Justice Brennan, in a footnote, p. 598, emphasizes that circumstantial evidence may be more certain, satisfying and persuasive than direct evidence.

In view of these recent decsions, I have great difficulty in visualizing a situation where an inference could not be made from some kind of circumstantial evidence, which would be said to support a verdict for the plaintiff. If I were completely convinced, it would be my duty to dissent in the case at bar. *Gibson* v. *E.J. & E. Ry. Co.*, ... F. 2d ....., opinion on rehearing. However, I shall await with great interest further pronouncements by the Supreme Court.

APPENDIX B.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Friday, September 27, 1957

Before

Hon. F. Ryan Duffy, Chief Judge
Hon. Philip J. Finnegan, Circuit Judge
Hon. Elmer J. Schnackenberg, Circuit Judge

Henderson Milom,
Plaintiff-Appellee,

No. 11996 vs.

New York Central Railroad Company,
Defendant-Appellant.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, with costs, and that this cause be, and it is hereby, REMANDED to the said District Court with directions to enter a judgment dismissing the action on the merits.

APPENDIX C.

Courts of Appeals; Certiorari.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal cases, before or after rendition of judgment of decree. June 25, 1948, c. 646, 62 Stat. 928, 28 U. S. Code, Sec. 1254 (1).

APPENDIX D.

The Federal Employers' Liability Act.

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, Sec. 1, 35 Stat. 65, Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404, 45 U. S. Code, Sec. 51.

APPENDIX E.

Actions; Limitations; Concurrent Jurisdiction of Courts.

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States. Apr. 22, 1908, c. 149, Sec. 6, 35 Stat. 66; Apr. 5, 1910, c. 143, Sec. 1, 36 Stat. 291; Mar. 3, 1911, c. 231, Sec. 291, 36 Stat. 1167; Aug. 11, 1939, c. 685, Sec. 2, 53 Stat. 1404; June 25, 1948, c. 646, Sec. 18, 62 Stat. 989. 45 U. S. Code, Sec. 56.

NO. 588

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

HENDERSON MILOM, *Petitioner*,

v.

NEW YORK CENTRAL RAILROAD COMPANY, a Corporation, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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TWENTIETH CENTURY PRESS, INC., CHICAGO 6

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IN THE

Supreme Court of the United States

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NEW YORK CENTRAL RAILROAD COMPANY, a Corporation, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The judgment of the United States District Court was entered on December 7, 1956. It is not reported but will be found on page 36 of the record filed with the Court of Appeals below. The opinion of the United States Court of Appeals for the Seventh Circuit, reversing said judgment, was filed on September 27, 1957, and is reported in 248 Fed. 2nd 52. The ruling will be found in Appendix A of the petition.

JURISDICTION

The judgment of the court of appeals sought to be reviewed was entered on September 27, 1957. The petition for a writ of certiorari was filed on December 26, 1957. Jurisdiction of this Court is invoked under Section 1254 (1) of the Judicial Code.

QUESTIONS PRESENTED

1. Was there any evidence to support the only charge of negligence presented to the jury that the Respondent maintained and provided the Petitioner with defective ice tongs?

2. Is a Court of Appeals stripped of its power of review in cases arising under the Federal Employers' Liability Act when no evidence of negligence by the employer is presented on behalf of the employee?

STATUTE INVOLVED

The pertinent provision of the Federal Employers' Liability Act (45 U.S.C. Sec. 51) is set out in Appendix D in the petition.

STATEMENT

This action was brought by Henderson Milom, Petitioner, a dining car waiter in the employ of Respondent, for injuries alleged to have been received during the course of his employment on November 16, 1954. (R. 9-13)

Petitioner was lifting a block of ice, weighing fifty pounds, from the floor of a dining car to a shelf, with a pair of ice tongs supplied by Respondent. (R. 73-74) When the ice had been lifted about three feet, the ice slipped in the tongs. (R. 74) Petitioner held onto the tongs with his left hand. The tongs regripped in the ice before it hit

the floor, thereby jerking or snapping his wrist. (R. 75) Petitioner then lifted the ice up onto the shelf. (R. 77)

From the date of the accident until April 4, 1955, approximately five months, Petitioner continued to work for the Respondent in his usual occupation. (R. 93) On April 4, 1955, an operation was performed on Petitioner's hand, and he remained in the hospital for three days. (R. 86) As a result he did not work again until August 1, 1955. (R. 93)

Petitioner had handled ice for Respondent for a period of thirteen years prior to the accident. (R. 91-92) He had looked at the ice tongs prior to the accident but did not inspect them. (R. 92) He did not make a complaint to anyone associated with Respondent, on, before, or after the day of the accident, concerning the condition of the ice tongs. (R. 94) No witness testified that the ice tongs were dull, or otherwise defective. In examining Petitioner, his counsel did not ask him whether the tongs were sharp or dull. Indeed, not one of the factual witnesses at the trial below could testify as to the condition of the tongs used by Petitioner. (R. 53-54, 115)

As far as the record in this proceeding is concerned, the Respondent had no knowledge, actual or constructive, that the condition of the tongs was in issue (R. 94, 115) until receipt of the Summons at the commencement of this action some nine months after the occurrence, August 26, 1955. (R. 1)

A different pair of ice tongs (Pl. X-1) was introduced into evidence by Petitioner. The witness, Edward Clements, testified that the exhibit looked like the tongs used by Petitioner, but could not say it was the same set of tongs. (R. 54) Witness Clements testified that he had seen the tongs used by Petitioner but had not examined them.

(R. 53) When the tongs were first offered into evidence, the trial court properly denied the offer for lack of a foundation. (R. 55)

Petitioner testified that the tongs offered into evidence looked like the tongs used by him at the time of the accident. (R. 77) The tongs were again offered for the purpose of showing them to "conform in physical shape and outline" to the tool used by Petitioner. (R. 77) The tongs were offered to show merely "the outline and configuration" of the tongs used by Petitioner. (R. 77-78) It was agreed that the exhibit was not the set used by Petitioner when injured. (R. 77)

Tongs used on Respondent's cars are part of the standard equipment and are replaced by the pantryman when desired. (R. 116) One point of replacement was at the very yard in which Petitioner was accidentally injured. (R. 116) Petitioner was the pantryman on the car in which he was injured. (R. 66)

REASONS FOR DENYING THE WRIT

Petitioner under "Question II" on page 2 of the Petition has raised for the first time the possibility that the tongs in question were "undersized." However, once interjecting that unfounded assertion into this Court, he fails to pursue the allegation further, as well does he fail to cite a record reference for the benefit of this Court. Nowhere in the record of this proceeding is there any reference, directly or indirectly, as to the adequacy of the size of the tongs, indeed, there is no evidence as to the condition of the tongs.

The opinion of the Court below is in accord with the decisions of this Court. The Court of Appeals confined itself to the narrow ground of review permitted under

the doctrine of *Rogers* v. *Missouri Pacific*, 352 U.S. 500, 77 Sup. Ct. 443 (1957); *Webb* v. *Illinois Central*, 352 U.S. 512, 77 Sup. Ct. 451 (1957); and *Schulz* v. *Pennsylvania Railroad*, 350 U.S. 523, 76 Sup. Ct. 608 (1956).

In the opinion below the Court states:

> ". . . to support an employee's action for damages, there must be proof of employer negligence and proof that it played some part, even the slightest, in producing the injury for which damages are sought. In the case at bar we find no proof of employer's alleged negligence, and hence there cannot arise any question of whether the negligence charge(d) played any part in producing plaintiff's injuries." (Appendix A, p. 4a)

Petitioner's whole argument for the granting of Certiorari is developed around the theory that the points on the tongs introduced in evidence (Pl. X1) are as sharp or dull as the points on the tongs in use at the time of the accident. Therefore, argues Petitioner, there is evidence in the record to show negligence on the part of the Respondent.

This argument ignores the only evidence present in the record pertaining to the question of whether Respondent "maintained and provided the plaintiff with defective tongs . . .", the only charge of negligence in Petitioner's amended complaint not abandoned or dismissed.

The Petitioner criticizes the opinion of the Court of Appeals, because that court placed much emphasis upon the fact that no one testified that the tongs were dull. The failure of this necessary testimony is excused by Petitioner with his assertion that the jury had an opportunity to see the tongs offered in evidence. After viewing the exhibit, according to Petitioner, the jury then decided the tongs used by Petitioner were dull. This reasoning is the

result of an outrageous distortion of the evidence presented in the trial below.

Petitioner attempted to introduce into evidence a set of tongs without a foundation as to the origin or previous use made of the exhibit. After failing in this attempt, the exhibit was admitted into evidence with these restrictions:

> Q. Mr. Milom, I will ask you to look at Plaintiff's Exhibit 1 for identification, and I will ask you whether or not Plaintiff's Exhibit 1 for identification conforms in physical shape and outline to the tongs that you used on the occasion in question?
>
> "A. Exactly, sir, except for maybe a little more paint or a little more rust, or less paint or less rust.
>
> "Mr. Wykell: I will reoffer in evidence Plaintiff's Exhibit 1 for identification.
>
> "Mr. Keating: Your Honor, I have no objection to counsel's offer if it is agreed and understood that these are not the tongs.
>
> "Mr. Wykell: Oh, definitely.
>
> "Mr. Keating: That they are similar tongs?
>
> "Mr. Wykell: Definitely. They are merely shown to show the outline and configuration.
>
> "The Court: They may be received.
>
> "Mr. Keating: I withdraw the objection I made yesterday." (R. 77-78)

After this stipulation as to the limited purpose for which the tongs were admitted into evidence, Petitioner now argues that the condition of the points on the exhibit in question can be compared with the points on the instrument used by Petitioner. On page 5 of the petition, it is argued that the jury could make the same use of a photograph of the original tongs as could be made of a set of

tongs admitted for the limited use of showing outline and configuration.

The fallacy of the argument of Petitioner is pointed up by the fact that none of the witnesses could, or did, testify as to the sharpness of the points on the original tongs. If no one testified as to the condition of the points on the original tongs, because no one had knowledge of that particular fact, then it is obvious that an exhibit, comprising a different set of tongs, cannot in any way be used to demonstrate comparison with an unknown fact.

Petitioner did not, and could not, testify as to the condition of the tongs used by him. His failure in this respect was due to his lack of knowledge of the material fact now sought to be established by counsel's argument concerning the exhibit in evidence. At the trial below, Petitioner testified as follows:

> "Q. Mr. Milom, did you look at or inspect the tongs prior to using them on the date of the accident?
>
> "A. I looked at the tongs, but I didn't inspect them, sir.
>
> "Q. Did you inspect them after the accident?
>
> "A. No, sir." (R. 92)
>
> "Q. Did you make a complaint to anyone associated with the railroad ever, either on the day of the accident or before, concerning a condition of ice tongs? . . .
>
> "A. No, sir." (R. 93-94)

The record clearly demonstrates that Petitioner's exhibit was admitted into evidence to demonstrate the *type* of tool used by him and not to show its *condition*. Petitioner is now trying to establish his necessary evidence by a subterfuge and misstatement of the purpose of the exhibit in question. It does not appear appropriate that evidence

necessary to sustain a jury verdict may be supplied for the first time on appeal to this Court.

Petitioner tacitly recognizes the complete lack of evidence in this record which would show that employer negligence played some part, even the slightest, in producing the injury for which damages are sought, *Rogers* v. *Missouri Pacific Railroad Company*, 352 U.S. at 508. Consequently, certiorari is sought on the theory that the jury could find negligence on the part of the Respondent by comparing the points on the tongs in evidence with the points of unknown sharpness on the tongs used by Petitioner. As has been previously pointed out, since no testimony was offered as to the sharpness of the points on the tongs used by Petitioner, the jury had no evidentiary basis for comparison.

CONCLUSION

For the foregoing reasons demonstrating the complete lack of evidence of employer negligence, it is respectfully urged that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

MARVIN A. JERSILD,
Attorney for Respondent

MARTIN J. KEATING,
Of Counsel

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SUPREME COURT, U. S.

FILED
MAR 2 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM 1957

No. 688

HENDERSON MILOM,

Petitioner,

vs.

NEW YORK CENTRAL RAILROAD COMPANY,
a Corporation,

Respondent.

PETITION FOR REHEARING OF ORDER ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Henderson Milom, petitioner, filed herein his petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit. This petition was denied on March 3, 1958.

Petitioner now respectfully requests rehearing of the order denying the petition for certiorari on the substantial grounds set forth herein.

STATEMENT.

This action was brought by Henderson Milom, a colored, dining car pantryman, as a result of injuries sustained while in the course of lifting a fifty (50) pound block of ice, using tongs supplied by the employer railroad.

In the trial Court the jury returned a verdict for the plaintiff and judgment was entered on the verdict in favor of the plaintiff and against the defendant.

The Court of Appeals decided that the trial Court should have directed a verdict for the defendant "at the close of plaintiff's evidence." (Appendix A, page 2a) This question was not before the Court, the defendant did not rest on its motion but proceeded to produce evidence. It is hornbook law, that once the defendant proceeds with evidence, so proceeding constitutes a waiver of the defendant's motion for a directed verdict at the close of plaintiff's case. One of the many cases so holding is, *Home Ins. Co. of New York et al.* v. *Pavila*, 212 F. 2d 731 (C.A. 1st) where it was said on page 733:

> "It is well-settled that if a motion under Rule 50(a) of the Federal Rules of Civil Procedure 28 U.S.C.A., asking for a directed verdict at the close of the plaintiff's case is denied, and the defendant thereupon presents his own evidence, this constitutes a waiver of the motion;"

The Court of Appeals in its opinion (Appendix A, 3a) states the trial Court correctly refused to permit an answer to the inquiry, "was the degree of the sharpness of the blades about the same?" The transcript of proceedings (App. 12, Rec. 55) shows the ruling as follows:

> "The Court: Sustained. He has already answered the question."

It is apparent that the trial Court concluded, and correctly so, that when the witness identified the rings in evidence, as being exactly like those used on the occasion in question it was unnecessary to put any further questions regarding the sameness of the component parts.

This decision of the Court of Appeals is in direct conflict with another decision of the same Circuit, *Gibson* v. *Elgin, Joliet & Eastern Railway Company*, (1957) 246 F. 2d 834, certiorari denied 78 S. Ct. 270.

REASONS FOR GRANTING THE WRIT.

1. There is conflict between this decision and the decision in *Gibson* v. *Elgin, Joliet & Eastern Railway Company*, (1957) 246 F.2d 834, certiorari denied 78 S. Ct. 270, and every decision of the United States Supreme Court beginning with *Rogers* v. *Missouri Pacific Railroad Co.*, 352 U.S. 503, 77 S. Ct. 443, the last in line being *Ferguson* v. *St. Louis - San Francisco Ry. Co.*, ... U.S. ....., October 1957 Term, No. 799, 26 Law Week 3264.

2. For the sake of uniform administration of the Federal Employers' Liability, certiorari should be granted.

3. The plain error of law committed by the Court of Appeals should be corrected.

4. The instant decision of the Court of Appeals is a serious infringement upon trial by jury in a Federal Employers' Liability Case.

CONCLUSION.

It is respectfully requested that this Honorable Court reconsider the petition for writ of certiorari.

EDWARD M. BURKE,
Attorney for Petitioner.

LEO K. WYKELL,
Of Counsel.

CERTIFICATE.

The undersigned certifies that this petition is presented in good faith and not for delay. It is restricted to the rule governing grounds specified on petition for rehearing.

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